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A TREATISE

ON

PURCHASE DEEDS;

CONSISTING OF

BRIEF AND FAMILIAR ESSAYS

ON

THE VARIOUS ASSURANCES BY WHICH FREEHOLD PROPERTY IS TRANSFERRED;

AND OF

PRECEDENTS

COPIOUSLY ILLUSTRATED BY

THEORETICAL AND PRACTICAL ANNOTATIONS.

BY

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OF THE INNER TEMPLE, BARRISTER AT LAW,

AUTHOR OF "AN ESSAY ON REMAINDERS, &c."

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PREFACE.

In submitting the present Treatise to the Profession, the Author is anxious to obviate as early as possible the charge of having done what has been done already, by displaying the plan he has adopted, and the objects he has aimed at, which will, he hopes, be found to combine novelty with practical utility.

I. In the classification of his topics and precedents he has consulted their real, not their abstract nature. Hence he has begun with the lease and release, the ordinary purchase deed of modern times, and gradually descended through the intermediate assurances which may be the medium of purchase transactions, to the ancient feoffment, proportioning the space and attention allotted to each to its present importance, and carefully avoid-

ing a parade of learning which is virtually obsolete, or which may be found in existing treatises.

2. In his precedents he has studied brevity, more, he believes, than has been done by any of his predecessors. In this he has complied with the requisitions of society, and the apparent wish of the profession; and has endeavoured to stop a main source of complaint and censure against modern conveyancing. When he has rejected an usual but (as he conceives) unnecessary clause or expression, he has generally given a reason for the omission, which he trusts will be deemed satisfactory; but he abandoned his original intention of accounting for every deviation, however minute, from the common form, from a conviction, that to detail what ordinary knowledge and reflection can suggest, would be wearisome to himself and unprofitable to his readers. In no precedents hitherto published, have principles been followed up to their legitimate consequences; but by observing them, it is the Author's opinion, that precision may be introduced into conveyancing with perfect safety, and that by clearing away the synonyms which darken the meaning without aiding the operation of the instrument, the attention will be forcibly called to the simple and significant words on which the law has impressed a peculiar efficacy.* He hopes that the intrenchment he

* Lord Alvanley's well-known reprehension of a departure from established forms has been frequently quoted, and much commended. Had his Lordship reflected that the forms to which he exhorted a

has made on existing forms will but slightly diminish the value of his work with those who may prefer them in their original diffusion, or who may be unwilling to reject clauses which, however useless, have the sanction of long duration and general reception. For first, these parts of the conveyance are an inconsiderable portion of the whole Treatise,—and secondly, as every omission and alteration of the least moment are carefully adverted to, the practitioner can, if he pleases, easily supply the usual verbiage.*

blind adherence, were themselves a departure from antecedently established forms, and that an excision of indefensible superfluities is as much a recurrence to ancient, as a relinquishment of modern usage? It has been judiciously observed, that "confusion and uncertainty in conveyancing arise from the use of ill defined words, and the affectation of unnecessary clauses;" and that "from an extreme caution to avoid this evil, conveyancers have taken the surest means to encrease it, (viz.) by an injudicious accumulation of synonymous expressions." Rede's Examination of the Law of England, vol. ii. 39, 40.

* The author will, however, observe, that the serious charge which has been brought against conveyancers, of unnecessarily dilating the bulk of deeds, is, in his view, but partly true: it is true in respect to the phraseology, and many of the clauses in the body of the instrument; but it is not true in its full application to *recitals*, to which it is mainly directed, and which are the principal means of increasing the conveyance. For though, *abstractedly* speaking, recitals are not essential to the validity of a conveyance, they are in many instances requisite to display its groundwork and connection with the preceding chain of title; indeed sometimes to render the frame of the instrument intelligible. And so long as courts of equity control real property, it must in a great proportion of cases be considered in the highest degree expedient to preserve and embody with the muniments of the title, evidence of the fairness of the transaction, which can only be done by reciting the antecedent facts.

3. But though the Author has, in retrenching superfluities, followed the dictates of reason operating on principle, more fearlessly than those who have gone before him, he has felt the force of the reflection that others may not always acquiesce in his conclusions, or wish to adopt his alterations. Hence much of what he still considers unnecessary matter has been retained, marked however with inverted commas, and most frequently attended with comments. But in many places the inverted commas are only intended to show what may be safely omitted when brevity is a paramount consideration.

4. In annotating on the precedents, he has mingled theory with practice, eliciting the principle of the instrument, and collaterally commenting on the

Illustrations of these remarks will be found in the ensuing sheets. But the author at the same time admits that the modern mode of reciting is pushed to an unpardonable extreme by those who enter on this part of the instrument with an ignorance of the principles on which, in rational practice, it is founded, and which alone can enable them to select and concisely develope such circumstances as it is proper to introduce. This observation will, it is hoped, be a satisfactory reason for the plan which the author has pursued in the present treatise, of curtailing the diction without in general diminishing, in any specific transaction, the usual number of recitals; and as the evil arising from their increasing the size of the deed, is felt n proportion to the smallness of the transaction or poverty of the parties, and consequently as it becomes less necessary, it may be easily obviated by impressing the draughtsman with the real nature and object of recitals, which will enable him to exercise over them a discretionary power, and adapt them to the circumstances of the case.

doctrines which are suggested by the recitals, when a knowledge of them is requisite to a comprehension of the transaction.

5. The numerical division and subdivision of the precedents in the margin are chiefly meant to facilitate reference and obviate the necessity of repetition. An analysis more accurately logical might be given,* but it would not have equally attained this end.

6. The peculiarities which may characterise the various forms are noticed only as they occur; and therefore when the reader meets any without an accompanying comment, he will probably find it explained in the anterior part of the work.

Finally, the Author requests that the critical and controversial parts of the work may be received in the spirit in which they were written, that of free inquiry; — with a desire of correcting such errors as he presumes to think (without forgetting his own fallibility) have been fallen into by those whose authority sanctions their opinions, and whose value and general accuracy his quotations will shew he can appreciate.

* See p. 22.

ERRATA.

Page 54, line 4 from bottom, *read* "the said S. Soame, of the first part, the said J. Jones, of the second part, and A. Aker, of the third part."

86, ... 9 *for* "W. Wilson," *read* "H. Howard."

143, ... 3 *after* "Howe," *read* "his heirs, executors, administrators, and assigns respectively.

199, ... 11 from bottom, *for* "in the counties of, &c." *read* "in the county of, &c." — there being only one recovery.

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A TREATISE

ON

PURCHASE DEEDS.

ELEMENTARY SKETCH OF THE CONVEYANCE BY LEASE AND RELEASE.

Original Mode of Conveyance in England.—Progress of Alienation.—A Lease and Release considered with a distinct reference to its constituent Assurances.

THE original mode in England of conveying lands in possession, of a freehold quality, was by feoffment; of which the ceremony called *livery of seisin*, or the actual delivery of possession, formed the essence. (*a*) When the subject of the transfer was a remainder or reversion, and no livery could therefore be made, a grant (*b*) (which could only be by deed) and an attornment of the particular tenant to the purchaser, were required. (*c*) These were not the only clogs on alienation. The concurrence of the feudal lord, and in some cases that of the heir, was also made necessary to the

(*a*) Wright, 37. 2 Bl. Comm. 311. (*b*) Co. Litt. 172.
(*c*) Necessity of attorning was taken away by st. 4 & 5 Ann. c. 16.

conveyance. (*a*) Still, however, the science of conveyancing rested on plain and well-known principles; feoffments and grants were the generic assurances; and though not at all times easily perfected, their operation was unobjectionable, and their nature intelligible.

But as the kingdom became wealthy and commercial, simplicity proportionably vanished from jurisprudence; and after the statute of uses (*b*) had turned a right in equity into an actual estate by incorporating the use with the land, *bargains and sales* became a frequent substitute for the ancient feoffment. These, however, being of a private nature, the statute of enrolments (*c*) was passed to give them the publicity which alone can preclude fraud. But the legislature in vain opposed the bent of the times, which demanded facility of alienation. As the statute of enrolments extended only to bargains and sales of a freehold estate, the conveyance by lease and release, the former being a bargain and sale for a year, and consequently of a chattel interest, presented an effective means of secret and easy transfer; and though a fraudulent evasion of the spirit of the legislature, and formerly suspected by some eminent lawyers (*d*), was soon generally adopted, and has now grown to be the ordinary conveyance of estates in fee.

The lease and release would naturally divide our attention into a separate consideration of its constituent assurances; for though to some purposes they are blended into one conveyance, yet in general, strictly considered, they are distinct; and to form a correct judgment of the precise nature and operation of *a lease and release*, the student must not begin with regarding it as an integral assurance possessed of specific qualities. What has been adverted to having, however, been amply done by others, I shall confine myself in the ensuing sketch to *a lease and release*, taken as one substantive convey-

(*a*) See Co. Litt. 94. Wright, 168. cited, but without much accuracy of deduction, 2 Comm. 287.

(*b*) 27 H. 8. c. 10. (*c*) 27 H. 8. c. 16.

(*d*) See 4 Cruise, Dig. 127. 3rd ed.

ance; referring only so far to its constituent parts as to speak of it,

First. With relation to the lease or bargain and sale for a year.

Secondly, With relation to the release.

First, then, the lease we must observe, no way resembles a lease at common law. While uses were fiduciary, it was a mere sale or transfer of the use, by rendering the bargainor a trustee for the bargainee during the term specified. (*a*) The statute of uses instantaneously annexes a legal ownership to the use, and the bargainee therefore has now an estate competent to ground a release. Hence, the criterion of the efficacy of the lease for a year, is the applicability of the statute of uses. Now that statute enacts, that when any person shall be seised of lands, tenements, &c. *or other hereditaments*, to the use, confidence, or trust of any other person or *body politic*, the person or corporation entitled to the use in fee simple, fee tail, for life, or *years*, or otherwise, shall from thenceforth stand and be seised or possessed of the *land*, &c. of and in the like estates as they have in the use, trust, or confidence, &c.

I shall now proceed to draw conclusions referrible to the conveyance by lease and release, but emanating merely from the present nature of the bargain and sale; for as it lays the foundation of the release, if it is by any means void, the whole assurance falls to the ground.

1. With respect to the parties to this conveyance, — we have seen that none who are incapable of standing seised to uses, can in strictness of principle be bargainors. On the other hand it may be laid down generally, that such as are capable of a use may be grantees in a bargain and sale; whence corporations (*b*) and the king (*c*) may be grantees, and even an alien may take, subject however to the right of the crown to take the benefit of the use. (*d*) It ought therefore

(*a*) 2 Inst. 671.
(*b*) 10 Co. 24. 34. 2 Roll. Abr. 787. pl. 8.
(*c*) Gil. Uses, 44.
(*d*) See All. 14. Sty. 40. Bro. 339. a. 338. b.

to be remembered, that *incapacity of receiving a use* is the only *peculiar* disqualification of a grantee in a lease and release. From a case in the First Institute it may, however, be inferred, that an estate of inheritance cannot be conveyed by this assurance to a corporation sole, if to take in its corporate capacity; because it cannot take the term, on which the release is grounded, in the same capacity. (*a*) And as this case is a consequence of the rule that a chattel interest cannot go in succession, the proposition is equally true of a release upon a bargain and sale under the statute, and one upon a lease at common law. But the release is not *void;* for if made to the corporation sole and *his successors,* it is still good for the life of the grantee; because he may evidently take a mere estate of freehold in his natural capacity. By parity of reason, if the release is made to the corporation sole and his heirs, the fee simple is given; though the *term* which the release enlarges be limited to the successors; because the grantee then takes the inheritance in his natural capacity, which is the same with that in which he has the term, inasmuch as the limitation of the term to his successors is nugatory.

2. Corporations cannot (at least on principle) convey by this assurance; for the words of the statute do not extend to them, except as *cestui que* use; and though capable of being trustees now, they could not stand seised to a use before the statute. But a decision (*b*) founded on arguments of convenience appears to have removed this disability; though its contravention of true principle has induced a belief that it is entitled to little regard. Indeed some writers have laid down the proposition without any notice whatever of the case adverted to (*c*), which nevertheless remains unaffected by any subsequent adjudication. Still it must be allowed to depend on a thin distinction, which nothing could have justified but

(*a*) See 1 Inst. 9 a. Otherwise, therefore, of a corporation aggregate.
(*b*) Holland v. Bonis, 2 Leon. 121. 3 Leon. 175. (*c*) See Watkins Conv. c. 6.

an auxiliary argument deduced from the inconvenience of disturbing the numerous titles, which at the time it was taken depended on bargains and sales by corporations. (*a*) And as this cause has ceased to operate, it is deemed prudent for corporations to convey by some other assurance. When a particular estate is in existence, they may convey by grant; when the lands are in their possession, they must make their election between a feoffment and a lease and release, with the former at common law. Feoffments are, it is believed, very rarely used even in this case; and as a lease at common law to ground a release in fee may not be unfrequently requisite, it may be noticed that the fact of an actual entry by the lessee, before the execution of the release, should be indorsed on the instrument and attested; and that it is prudent to advert to this fact in the recital of the lease for a year in the release. But,

3. *Tenants in tail,* and *tenants for life,* may convey by this assurance; for before the statute their estates might have been clothed *with either a use or trust;* and as they are *seised,* they are manifestly within the words of the statute. And it is now fully established that a lease and release by tenant in tail passes a base fee, determinable by the entry of the issue in tail. (*b*) To a *certain extent,* therefore, the capacity of tenant in tail to stand seised to a use is settled; but of his general capacity (*c*) this is not the place to speak.

4. On the same principles it may be advanced, that whatever may be conveyed to uses may be conveyed by lease and release. Whence any incorporeal hereditament *in esse,* and savouring of the realty (*d*) (as a rent, &c.), and not merely personal (as an annuity), may be the subject of it; though indeed there is no necessity for a lease and release to pass any

(*a*) 2 Prest. Conv. 254.

(*b*) Machel v. Clarke, 2 Salk. 619. 2 Ld. Raym. 778. Goodright v. Shilson, 3 Burr. 1703. overruling Tooke v. Glasscock, 1 Sand. 250. which followed Litt. 612, 613. 650.

(*c*) This is still *vexata quæstio.*

(*d*) See Cro. Eliz. 166.

incorporeal hereditament, as a grant is equally effective for that purpose. But though a sort of incorporeal hereditament, it is usual and proper to convey

5. Reversions and vested remainders by this assurance. The propriety of adopting it arises from its obviating, at a future period, the proof of a particular estate being *in esse* at the time of the conveyance; a circumstance of course essential to a grant. But although, in addition to the general reason for their capability to pass by a lease and release, they might have been the subject of a bargain and sale, while uses were fiduciary, and are within the express words of the statute; yet some have erroneously supposed an estate *in possession* necessary to the operation of the release (*a*); whereas nothing is required to ground a release but a vested particular estate. (*b*) But,

6. *Contingent remainders* cannot be transferred by a lease and release; for there cannot be any *seisin* of these; and consequently the bargainee takes no legal estate, and nothing to ground the release. (*c*) And as this conveyance (like a bargain and sale of the freehold or covenant to stand seised) does not, *as such* (*d*), operate by estoppel, it follows that when a contingent remainder is the subject of it, it is a nullity. And future uses, and executory devises, whatever may be their specific form and denomination, and although they confer an interest which, in reference to the certainty of its taking effect in possession, is vested, are equally incapable of being passed by a lease and release. (*e*)

Secondly, with relation to the release:—

The release is by way of *enlarging an estate*, of course entirely at common law; and one great utility of the lease and release arises from this cause; for uses could not be declared

(*a*) 2 Bl. Comm. 339.

(*b*) Fully proved by Mr. Booth, 2 Cas. and Opin. 144.

(*c*) A contingent remainder cannot, strictly speaking, be transferred by any *conveyance* at common law, or under the statute of Uses. See Fearne, 366. 1 Sand. Uses, 108. (*d*) Infra. 7. (*e*) Ibid.

on the release, unless it gave the common law-estate to the releasee. The following are the most material and striking attributes of the lease and release, with more peculiar reference to the release.

1. The denomination of this conveyance supposes an antecedent term to be enlarged; the particular estate is created by the bargain and sale to be merged by the release, and from the nature of the transaction, there must be a privity between the parties. Whence in this conveyance the question whether the requisition of the law, with respect to privity between the releasor and releasee, is complied with, cannot arise.

2. It requires words of limitation in order to confer an estate of inheritance on the releasee. (*a*) In this respect it resembles a feoffment or grant, and bears no analogy to the other species of releases; for these last act merely on a right and by their own force, and not only do not require an expansive power from words of limitation, but cannot be restrained by them. A release *per mitter le droit*, or by extinguishment, of all the releasor's right, for an hour, &c. is as complete as if made in unqualified terms, or with an expression of perpetuity. (*b*)

3. It works of itself no estoppel. There is, indeed, a decision of Lord Kenyon, which, in the generality of its terms, would extend the doctrine of estoppels to a release by enlargement and conveyances which are derived from the statute of uses (*c*); but the authorities do not not support the position. The true proposition, however, is that a release does not estop *qua* such; *not* that the *instrument* by which it is made may not estop, if sufficiently solemn. It will not, like a feoffment, work an estoppel by *matter in pais;* but it undoubtedly may produce that effect by *matter in writing*; and therefore as a release by enlargement *must* be by *deed,* and *always is* by *indenture,* a lease and release at the present day

(*a*) Litt. 465. (*b*) Ibid. 466—467. Gilb. Ten. 55. (*c*) 3 T. Rep. 370.

will estop when it cannot operate as a conveyance. The writer, in an early production, advanced this opinion, (*a*) in the face, however, of the general opinion of the profession, which he conceived to be inaccurate from not discriminating between an estoppel produced by the nature of the assurance, and an estoppel effected by the nature of the instrument, by which that assurance is made. He conceives, therefore, that the late decision of the Vice Chancellor (*b*), which is built on this principle, is in perfect unison with the established distinctions of our ancient law. (*c*)

4. It is innocent in its operation (*d*), not working a disseisin, nor even forfeiture, when made by a tenant for life (*e*) or years. (*f*)

Hence, if a tenant for life, with a contingent remainder dependent on his estate, makes a lease and release in fee, the contingent remainder is not barred. So if there be tenant for life with a power in gross, that is a power by which he is enabled to create an estate ulterior to his estate for life (*g*), it is unaffected by a lease and release in fee. (*h*) Even a power appendant (which is annexed to, and in fact involved in, the estate of the donee of the power) (*i*) is not destroyed by this conveyance, unless it transfers all the interest of the donee; and then its destruction is virtual and indirect. For although the donee of a power appendant does not suspend the right of exercising it during the continuance of any limited interest which he may create, by this or any other innocent assurance operating on the estate which is subject to his power, yet he is not allowed to over-reach and defeat such

(*a*) Essay on Uses, 179. citing Co. Litt. 352.

(*b*) Bensley v. Burdon, 2 Sim. & Stuart, 519. His Honor observed that 'the text writers upon this subject state, that estoppel is wrought *by any deed indented*, making *no* exception.'—'Of what importance' (he continued) 'to this principle can it be, whether the indenture which operates this effect is an indenture of release, or an indenture of feoffment.' Ibid. 526.

(*c*) See Co. Litt. 352. (*d*) Fearn. 322. Co. Litt. 328. a.

(*e*) 1 Inst. 251. Litt. 600. 606. 2 Leo. 60. 3 Mod. 151.

(*f*) Saunders v. Annesley, 2 Sch. & Lef. 99. (*g*) Hard. 410.

(*h*) Phitton's case, cited Hard. 412. (*i*) Sugd. Pow. 46.

interest; and consequently a conveyance of his whole estate, for ever precludes the effective execution of the power. (*a*)

In the innocence of its operation a lease and release agrees with a grant, bargain and sale, and covenant to stand seised. But either of them, except a grant which is innocent from the nature of the subject matter, may acquire in transferring corporeal hereditaments a tortious operation, by that legal incorporation with a fine or common recovery, which is produced by a fine being levied or recovery suffered in pursuance of a covenant contained in an antecedent assurance (*b*), or perhaps by any other circumstance shewing that the fine or recovery wasnot intended to be an independent transaction. (*c*) And if a tenant in tail in possession conveys by lease and release, and adds a warranty, he discontinues the estate tail. (*d*)

But with these exceptions a lease and release is an innocent assurance (*e*); and the reason is, that a release by enlargement does not, like a feoffment, operate on the possession, but on a remainder or reversion, and is consequently analogous to a grant.

5. It has been doubted whether there can be a resulting use on a lease and release. It is, however, admitted that if a partial or limited use be declared to a stranger, the residue results. (*f*) And the better opinion is, that in the absence of any consideration or declaration of use, the whole inheritance results. (*g*) For it ought be be remembered that in the doctrine of resulting uses, the courts of law preserved the

(*a*) See Doug. 293. Noy 66. (*b*) Doe v. Whitehead, 2 Burr. 704.
(*c*) See But. Fearn. 380. n. (x). 1 M'Clell. & Younge 58. 5 Bar. & Ald. 569.
(*d*) Litt. 601. (*e*) 2 Sand. Uses. 64. (*f*) 7 Mod. 77.
(*g*) In Goodtitle v. Gibbs (5 Bar. & Cres. 709) Lord C. J. Abbott, in delivering judgment, treated this point as clear: but it was not involved in the circumstances of that case. There is, perhaps, a slight inaccuracy in his lordship's language, as he speaks of the effect of the *habendum* (meaning of course the declaration of use which immediately follows it) in preventing the resulting use. Ibid 719. Still, however, when such declaration is to the grantee of the common-law estate, it may correctly enough be considered as part of the habendum. Vid. inf.

latitude of construction which the courts of equity possessed while uses were fiduciary; and held the resulting of the use in its legalized state to depend on the presumable intention. Now when there is no consideration nor declaration of use in a feoffment, grant, fine, or common recovery, the use on this ground instantaneously results to the feoffor, grantor, conuzor, or recoveree; and a lease and release differs from these only *in the form of assurance*, and consequently under the same circumstances ought equally to produce the same effect. But it was contended by counsel in the case of Shortridge *v.* Lamplugh (*a*), where this point was solemnly argued, that *as* the lease and release was to be be regarded as one conveyance, the consideration of the bargain and sale was communicated to the release, and prevented a resulting use. It was urged on the other side, this result did not follow, because the *lease* and *release* were *distinct* conveyances. That assumption, however, would lead by a more plausible argument to the conclusion it was adopted to repel; and the more unobjectionable mode of meeting the proposition appears to be to *admit* the lease and release to be one conveyance, *considered with reference to the real nature of the transaction.* It will then follow that it ought to be so regarded, with *reference to the question of resulting use:* for *otherwise* the courts of law would *not* act on those liberal principles of construction, which in *this* branch of the doctrine of uses, were transferred by the statute of uses to their jurisdiction from the courts of equity. (*b*) When, therefore, they assimilate a lease and release to a feoffment, &c. they must suffer the analogy to be controlled by the fundamental principle on which the doctrine of resulting uses rests — the *intention of the parties;* and, therefore, as the consideration in *those* assurances is material only as it shews that intention, they must decide that the *nominal consideration* in the bargain and sale for a year, inserted therein

(*a*) 2 Salk. 678. 7. Mod. 71. 2 Lord Raym. 798.
(*b*) Co. Litt. 23. a. 3 Co. 81. b. Dyer. 166.

for the *sole* purpose of giving *validity* to that instrument, not evincing an intention to confer the legal fee on the releasee, has not the effect which it would possess if in the *release itself*. (*a*) By parity of reason it is equally frivolous to lay any stress on the extinguishment of the estate of the lessee.

These are the principal features of a lease and release; my endeavour has been to give a general idea of its nature and operation as an integral assurance: a release by enlargement considered abstractedly would involve some topics which have not been adverted to.

PRECEDENT I.

BARGAIN AND SALE FOR A YEAR.

Exordium. THIS INDENTURE, made this day of , in the year of our Lord , between John James
Parties. of , Esq. of the one part, and Edward East of , gentleman, of the other part, (1)
Testatum. WITNESSETH, that the said John James, in consideration of five shillings of sterling (2) money (3), to him paid by the said Edward East, before the execution of these presents; ("the receipt whereof is hereby acknowledged")
Operative words. by these presents (4), DOTH bargain and sell (5) to the said Edward East
Parcels. ALL, (*describe the parcels*) (6) together with all and singular the appurtenances (7) to the said hereditaments, or any of them, or any part

(*a*) In support of this reasoning see Lloyd v. Spillet, Barn. Cha. Rep. 384. 2 Atk. 148. See also 5 Bar. & C. 719.

Habendum. thereof: TO HAVE AND TO HOLD the said hereditaments and premises hereby bargained and sold, with their appurtenances, unto the said Edward East (8), from the day next before the day of the date of these presents, for

Intent. the term of one year (9): TO THE INTENT that "by these presents and the statute for transferring uses into possession," the said Edward East may have the legal estate (10) of the same premises, and thereby be enabled to take a release of the reversion thereof to him and his heirs, to the uses (11) declared by another indenture of three parts, intended to be dated the day next after the date hereof: IN WITNESS (12) whereof the parties to these presents their hands and seals have set, the day and year first above written.

(1) The lease must be made to the releasee, whether he takes the legal estate, or a mere seisin to uses, which becomes (except to a few disputed purposes) extinct at the moment of its creation. If, therefore, the release be to A. in fee to the use of B. in fee, when instantaneously on the execution of the conveyance, B. is the legal and substantial owner, and A. has only a momentary seisin, the bargain and sale must, nevertheless, be to A., and if made to B. the release would be void. Some additional remarks will be made on this subject in a future note.

(2) The word 'sterling,' is defined by lexicographers to be an epithet by which genuine English money is discriminated, and it consequently expresses with exactness, the usual periphrasis of lawful money current in Great Britain (*a*) and Ireland.

(3) By a partial transfusion of the principles of equity into the courts of law, on the passing of the statute of uses, a valuable consideration continues to be of the essence of a bargain and sale in its

(*a*) The currency of Great Britain is *now* the currency of the United Kingdom, 6 G. 4. c. 79. Before this act the word sterling was thought uncertain, as it might mean either British or Irish money. Pickardo v. Machado, 4 Bar. & Cres. 886.

legalized state. (*a*) Its amount, however, is immaterial; even a pepper corn suffices (*b*); and as an averment is not allowed to contravene the express statement of the deed, this consideration, though nominal, gives validity to the instrument. (*c*) But as a valuable consideration, in the absence of any expression of its payment in the bargain and sale, may, if it state a general consideration (*d*), be proved *aliunde*, the want of this usual statement of the nominal consideration in the lease for a year, would not, it is apprehended, be held to vitiate it on a sale of lands; because the purchase money is for the whole of the vendor's interest, and would, it is conceived, in support of the bargain and sale, be determined to enure to it on an averment to that effect. But in the absence of authority, it may be safely advanced that the mere statement of a general consideration, which renders an averment requisite to raise the use (*e*), would render a title unmarketable. These observations are submitted as deductions from principle.

(4) There is a manifest impropriety in repeating the operative words in all conveyances unattended with livery. I have therefore expunged the past tense. The reason why the practice is correct in feoffments, gifts in tail, and leases for life is, that in those assurances the livery, which may be an antecedent act, is the real conveyance; the written instrument but a record of that fact. (*f*) But where no prior conveyance is adverted to, and the deed is itself the conveyance, the practice is unmeaning and absurd.

(5) It is accurate to use no other operative words; as when conveyances may operate either at common law or by statute, the former in general prevails (*g*); not indeed that it could in this case were there words of demise, because the intention, which is abundantly clear, is allowed to control the construction.

It is observable, with respect to the operative words, as contradistinguished from words of limitation, that bargains and sales, whether of freehold or chattel property, retain much of the latitude which belonged to them in their equitable state. Hence when there is a valuable consideration, any words (as for example, give, grant (*h*), confirm, agree, or covenant for money) (*i*) will enable the instrument to operate as a bargain and sale.

(6) The parcels are usually described as in the release, and it is scarcely necessary to observe, that if the description in the bargain

(*a*) 1 Co. 176 a.
(*b*) Barker v. Keate, 2 Mod. 252. — Note, the point was *decided*. Mr. Sanders (2 Uses, 46. n. s.) erroneously treats it as a *dictum*.
(*c*) 2 P. Wms. 204.
(*d*) Moo. 569. 2 Roll. Abr. 786.
(*e*) 1 Co. 176 a.
(*f*) Co. Litt. 281.
(*g*) 8 Rep. 93. But. Co. Litt. 272 a. VI. 2.
(*h*) 2 Roll. Abr. 787. pl. 5.
(*i*) Grey v. Edwards, 4 Leon. 110.

and sale be less comprehensive than that in the release, the latter assurance is void as such, for what is not contained in the former.

It should seem that the parcels in the bargain and sale may be described by way of reference to the release; though the efficacy of this plan has been doubted on account of the release not being in existence at the time at which the reference is made. It must, however, it is conceived, be presumed that the release is prepared at the time of executing the bargain and sale, as the latter instrument always alleges that fact; and it would contravene all analogy to say that when an instrument is referred to, merely for a more explicit description of the parcels, it must have been antecedently executed. Mr. Preston seems to have viewed this point in the same light. (*k*) Another difficulty has been thought to be raised by the stamp laws (*l*); but in this objection, it is conceived also, that there is no weight. The stamp laws do not make an instrument inoperative. The sole effect of the want of a stamp is to prevent the instrument from being given in evidence; whence of course when an unstamped conveyance is duly stamped, it must be taken to have been so from the time of its execution. But, on the above assumption, that according to the allegation in the bargain and sale, and indeed, to the presumption necessarily arising from the reference to it, the release must be intended to have been *prepared* at the time of executing the bargain and sale, no objection can, it is apprehended, be raised on this ground, because in legal supposition the *intended* release has the proper stamp at that moment. And an argument resting itself on the non-execution of the instrument cannot be drawn from the stamp laws, but (if deducible from any source) solely from the principles of the common law. I canvass only the question, whether the mode commented on be *valid:* It is superfluous to recommend the avoiding any practice while clouded with doubts by gentlemen of eminence, however much we may be privately persuaded of its emanating *ex nimiâ cautelâ*. When therefore the parcels are long and entangled, and brevity is desirable, it is prudent to adopt the advice of Mr. Preston, and to use such general words of description, as will certainly comprise all the lands to be included in the release. An inadvertency in this respect may be guarded against, by adding to the specific description, the following general reference; "and all the other hereditaments (if any) which are intended to be released by the indenture hereinafter referred to."

(7) What are called the general words being only a specification

(*k*) 2 Conv. 382 to 385. (*l*) Ibid. 384.

of things, which pass inclusively under the word "appurtenances," I omit them. (*m*)

It is usual to insert the clause of "*the reversion*, &c.," and omit that of 'all the estate, &c.;' but I omit the former likewise, because it is settled that a conveyance of the lands, as if they were in possession, will pass a remainder or reversion in them (*n*); though the converse of the position fails; consequently that clause is not a necessary part in this or any other assurance. It may be remarked, however, that the insertion of the clause of '*all the estate*' in this or any other instrument, creating a derivative estate is immaterial, because, on the principle which is now established, that the construction must be on the entire deed (*o*); the generality of that clause will in every case be restrained to the particular interest specified in the habendum. (*p*)

(8) Here, as in the premises, the usual words of limitation to the executors, &c. of the bargainee are omitted as superfluous. *Expressio eorum quæ tacitè insunt nihil operatur.*

(9) Though a year is the term invariably created, the release would of course be equally effectual, were the bargain and sale for a longer or shorter period; it requiring only a legal vested estate to work upon. If however a longer term than the usual one were in any instance created, and the question of resulting use arose, there would perhaps be stronger reason for admitting the doctrine advanced by Powell J., in Shortridge v. Lamplugh (*q*), than in the common case.

The habendum might be "henceforth," "from the making," "date (*r*)," and according to modern decisions (*s*), from the "day of the date:" for the only object is to grant an immediate estate. But according to the old cases the last words create an *interesse termini*, being exclusive of the day of the date; and the decisions which contravene them are of doubtful authority.

I have omitted the reddendum reserving a pepper-corn rent, as

(*m*) Mr. Humphreys (Real Prop. 331.) observes that they are '*peculiar* to our *modern* forms.' "As incidents to property," he continues, "their mention is in reality useless; *at all events* they are included in the *appurtenances*." And see Touch. 90. Most of them are synonyms. In one case the court addressing itself to the general words of the instrument, said the words are four — 'commodities, emoluments, profits, and advantages,' all which are *of one sense*. In London v. Southwell. Hob. 304.

(*n*) Plowd. 161. 10 Rep. 107 a. Vaugh. 83. (*o*) 1 Buls. 101. P. Wms. 457.

(*p*) Earl of Derby v. Taylor, 1 East. 502. (*q*) Sup. 10.

(*r*) The lease in these cases begins on the day on which the deed is delivered. See 1 Ins. 46. b. 5 Rep. 1.

(*s*) Freeman v. West, 2 Wils. 165. Pugh v. D. of Leeds, Cowp. 714.

made superfluous by the previous consideration. Still it may be noticed, that according to the case of Barker v. Keate (*t*), the reservation of a pepper-corn rent would of itself be sufficient to support the bargain and sale. The circumstance in that case of the lease and release being to the tenant to the *præcipe* for suffering a common recovery was, it is conceived, immaterial, and therefore no reason for restricting the proposition deducible from it. The authority of Barker v. Keate, however, though never impeached, has been rather timidly received; it would therefore be improper to throw the support of the instrument on that reservation. The writer speaks rather with reference to the marketability of the title, than to the validity of the bargain and sale; for doubtless, were the question to arise, the courts would hold themselves bound by the case of Barker v. Keate.

(10) The reader will perceive that the usual language is altered. The expression "actual possession" is inaccurate; for the statute of uses in no case confer an actual possession; whence for a bargainee or other *cestuique* use to maintain trespass, he must make an actual entry. (*u*) Were more than a vested estate essential, a remainder or reversion could not be conveyed by lease and release. In no point have respectable text writers so grossly erred, as in supposing the reverse. Lilly laid it down in the most unequivocal language, that "no person can make a bargain and sale for a year who hath not the actual possession at the time of the sale." (*v*) Sir W. Blackstone appears to have entertained the same idea. (*w*)

(11) If the release be merely to the purchaser in fee, the language may be "to the use of him and his heirs."

(12) The bargain and sale is always by deed; but unless the subject of it be an incorporeal hereditament, a deed is not essential; for a bargain and sale of chattel interests derived from a freehold *seisin*, not being within the statute (*x*), which clothed a bargain and sale of freeholds with particular solemnities, it is only within the general requisitions of the statute of frauds. (*y*) Of the great characteristic solemnity of a deed, sealing (*z*) and delivery, it would be going beyond the proposed limits of this work to speak; and the

(*t*) Sup. 13. (*u*) Cro. Jac. 604. Ventr. 361. (*v*) Conveyancer, 325.

(*w*) 2 Comm. 339. sup. 6. and see 2 Prest. Conv. 445, where it is observed, that as the bargain and sale gives the estate, any language which shows that the grantee has a vested estate for one year, will be more correct. (*x*) 27 H. 8. c. 16.

(*y*) 29 Car. 2. c. 3., which rendered necessary a deed *or* note in writing.

(*z*) Sealing seems to have been generally introduced into England by the Normans. (See 2 Bl. Com. 305.) For though the usage was certainly known to the

doctrine is so fully detailed in established text writers (*a*), that to enter on it here would be superfluous. Although however this has been one of the most stationary doctrines of the common law, there have been of late a few decisions (*b*), the effect of which has been to open the law, and render technical expressions less efficacious than formerly. This remark is more peculiarly applicable to *escrows;* to form which, delivery to a stranger is no longer requisite (*c*) ; but the substance of the transaction is regarded, and the question whether the instrument was intended to operate as an *escrow* is often left for a jury to determine. (*d*)

THE RELEASE WITH USES TO PREVENT DOWER.

(1) THIS INDENTURE (2) made this day of (3), &c., between John James, of , &c., of the first part, Edward East, of , &c., of the second part, and George Giles, of , &c., of the third part (4): WHEREAS (5) by indentures of lease and release, bearing date respectively (6) the and days of , 18 , the release made between Henry Howard, of the first part; William Wildes, of the second part, and the said John James, of the third part, for the valuable (7) consider-

I. Recitals. 1. Lease and release, to the vendor in fee.

Anglo-Saxons, it does not appear to have been a requisite means of giving validity to legal instruments. Some sealed charters of the Anglo-Saxons have, however, been met with. That of Edward the Confessor, to Westminster Abbey, is well known. The seal of Ethelwald, bishop of Dunwich (830—70), has lately been dug up by a labourer, in a garden near the monastery at Eye, and is now in the British Museum. Archæologia, v. 20. p. 480.

(*a*) Vid. Touchs. 56 to 61. Com. Dig. Fait, (A 2.) Roll. Abr. Fait, (H.) Co. Litt. 225. 2 Comm. 306.

(*b*) See in particular, Doe v. Knight, 5 Bar. & Cres. 671., where the subject is ably discussed by Mr. J. Bayley.

(*c*) 4 Bar. & Ald. 430. (*d*) 2 Bar. & Cres. 82.

ations therein expressed, the hereditaments (8) hereinafter described, were conveyed to and to the use of the said John James and his heirs: AND WHEREAS the said John James hath contracted with the said Edward East, for the sale to him of the said hereditaments (9), as hereinafter mentioned, for the sum of £ (10); "and the said Edward East hath requested that the said hereditaments may be conveyed to him and his heirs, to the uses hereinafter limited (11):"

2. Contract for sale.

II. Testatum. NOW THIS INDENTURE (12) WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of sterling money, paid (13) by the said Edward East, to the said John James, immediately before the execution of these presents, in full for the absolute purchase of the fee simple of all and singular the said messuages and hereditaments, free from all incumbrances, (except as hereinafter mentioned), the receipt of which said sum the said John James doth hereby acknowledge, and therefrom release (14) the said Edward East (15), he the said John James, by these presents, DOTH release and confirm (16) to the said Edward East (17), (in his legal ownership*, now being by a bargain and sale to him thereof made by the said John James, in consideration of five shillings (18), and dated the day next before the day of the date of these presents, for a

III. Operative words.

IV. Bargain and sale.

* Sup. n. (16.)

term therein mentioned) (19), and his heirs all. (20)

V. Parcels.

VI. Appurtenances. Together (21) with all and singular the appurtenances to the said hereditaments, or any of them, or any part thereof (22);

VII. Deeds and attested copies. "AND all such muniments of title relating thereto, either alone or jointly with other property of the said John James, which is of less value, as are now in his possession, or which he may obtain without suit at law or in equity; and attested copies of all such other muniments of title as are now in the possession of the said John James, or as he may obtain without suit at law or in equity, and as concern the said premises jointly with other property of the said John James of equal or greater value; such copies as shall be required after the execution of these presents, to be made at the request and expence in all things of the said Edward East, his appointees, heirs or assigns." (23)

VIII. Habendum. TO HAVE "AND TO HOLD (24)" the said hereditaments hereinbefore described, with their appurtenances, unto the said Edward East (25) and his heirs, "to the uses (26) hereinafter declared, that is to say (27)," To such uses generally, by way of rent-charge thereout (28), or otherwise, and either absolutely or conditionally (29), as the said Edward East by any deed or deeds (30) to be sealed and delivered by him (31) in the presence of one,

IX. Uses.

or more, credible witness or witnesses (32) shall appoint, and in the mean time, and subject to such uses as shall have been limited by the said Edward East as aforesaid; to the use (33) of the said Edward East (34), during his life (35), and after the determination of that estate by any means in his lifetime, to the use of the said George Giles, and his heirs (36), during the life of the said Edward East, upon trust for him (37), and after the determination of the same (38) estate, to the use of the said Edward East and his heirs. (39)

X. Covenants for title.

AND (40) the said John James for himself, [and] his heirs, "executors and administrators (41)," doth hereby covenant with the said Edward East, "his appointees, heirs and assigns (42)," in manner following, that is to say, that notwithstanding any thing made, done, or suffered, by him the said John James (43), (except as hereinafter excepted),

1. Right to convey.

he the said John James hath good right to release the premises hereinbefore described in manner aforesaid, and according to the intent

2. For peaceable enjoyment.

of these presents (44); AND (45) that it shall be lawful for the said Edward East, his appointees, heirs and assigns, at all times hereafter peaceably to possess the same premises with their appurtenances, and to receive the "rents and" profits thereof, without any interruption or disturbance (46) from the said John James, or any person or persons, "lawfully or

equitably" claiming through, under, or in trust for, him or his heirs (47), (except in respect of the interest hereinafter excepted);

3. For freedom from incumbrances.

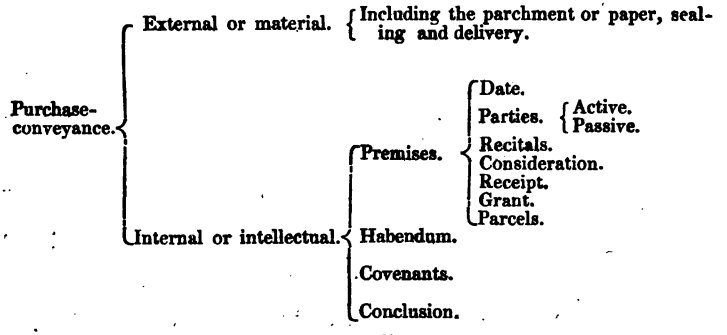
AND THAT (48) free from all other interests, titles, tithes, liens, or other incumbrances (49), occasioned or suffered by the said John James, or any person or persons rightfully claiming, or to claim the same, at law or in equity, in or upon the said premises, or any part thereof, through, under, or in trust for, him or by his means "or default," (50) [*Here specify the incumbrances, if any, subject to which the lands are conveyed*];

4. For further assurance.

AND ALSO that he the said John James, and every person rightfully claiming, or to claim, any interest at law or in equity in the said premises, or any part thereof, under, or in trust for him or his heirs (51), shall at all times hereafter on every reasonable request, and at the sole expence in all things (52), of the said Edward East, his appointees, heirs, or assigns, make and do, or cause to be made and done, all such further acts and assurances in the law, be the same by fine, common recovery, deed enrolled, or otherwise; for more satisfactorily assuring the said premises with the appurtenances to the said Edward East, his appointees, heirs, and assigns, in manner aforesaid, and according to the intent of these presents, as by him or them, or his or their counsel in the law, shall

be lawfully and reasonably advised and required (53); so as no such further assurance contain or imply any more general covenants, or warranty on the part of the person or persons who shall be requested to make and execute the same, than for the acts, deeds, or defaults, of himself, herself, or themselves, respectively, and his, her, or their, heirs, executors, and administrators (54); and so as no such person or persons be compellable for the purpose of doing such acts, or making such further assurances, to travel from his, her, or their, dwelling or respective dwellings. (55) In witness, &c.

(1) The reader is requested to remember, that this numerical division of the conveyance, is merely for practical utility, to facilitate apprehension and reference. A more logically accurate analysis of a modern purchase deed, in which the formal language of the law is observed, may be acceptable to him.



This analysis enters only into the ordinary parts of the deed.

(2) This commencement of the deed, from reasons mentioned in a subsequent note, is ungrammatical; as it is evidently the dependent member of an unfinished sentence.

(3) The release is always dated on the day after the day of the date of the bargain and sale. But it is manifest, that it would be

equally valid if dated and executed on any other day within the term created by that instrument.

(4) This precedent is a release to uses in its most simple form, and therefore it has never fewer than the present parties. When, however, as in the present instance, the common-law estate is conveyed to the purchaser, there is no *necessity* for making the dower trustee a party. For 1st, the dower trustee states by way of use. 2ldy, by way of remainder. (*a*)

In arranging the parties a conveyance, it is usual to place the purchaser before his trustee. This is the only remark the present instrument calls for on this point; others will be made at their appropriate places.

(5) The object of recitals is to relate such facts as are necessary to explain the grantor's title. This object, which common sense dictates, should always be kept in view, as it is only by invariably observing it, that the precision so peculiarly desirable in this part of the conveyance, can be preserved. Recitals, though not necessary, are certainly expedient, as they show the links of the title; the estate which the vendor conveys, or the authority he acts under; and consequently strengthen by elucidating the title of the purchaser.

When the vendor is seised in fee, some gentlemen simply state that fact; others omit it, and begin with the contract for sale; but the more usual practice, except when brevity is a material object, is (as in the present instance) to revert to the last purchase deed, which not only shows the seisin of the vendor, but the manner in which it arises; which, with respect to the covenants he enters into, we shall hereafter see is of consequence. The purpose therefore of this recital is only to show that the lands were conveyed to the vendor in fee. This has been the plan most frequently adopted in the ensuing sheets. It should, however, be noticed, on the other hand, that the doctrines of equity, which govern modern conveyancing, suggest as a point of general expedience, the propriety of avoiding, as much as possible, the recital of *instruments*, in consequence of a recital of them being notice of them, and affecting the purchaser with a knowledge of their contents. And if, in addition to the vendor's being seised in fee, a brief, but accurate allusion be made to the mode in which he acquired it, there is as complete a demonstration of the correctness of the form, which the conveyance assumes, as by a recital of the last purchase deed. Should the reader deem this observation just, he may commence with reciting thus:— "Whereas the said J. James, being seised in absolute fee-simple by

(*a*) Cro. Eliz. 10. Raymd. 143. Carter, 60. Co. Litt. 230, b.

purchase, for a valuable consideration of all the hereditaments hereinafter described, has contracted," &c. This is the mode which the author is inclined to recommend as equally accurate, — briefer, — and safer (it may be) to the purchaser.

(6) To avoid the consequences of error in the recital of dates, it is usual to recite deeds as bearing date *on or about*, &c.; thus allowing the deed to be producible in evidence, though the date be mistaken. And where the recital is rendered material, by the grant depending on it, this practice is important, as then a mis-recital may be fatal. Thus, if one having a lease dated the 1st of January, &c., should recite it as dated the 2d of January, and then assign the lands demised by that indenture, the assignment would be void at law, though in favour of a purchaser, equity would relieve. (*b*) But when, as in the present instance, the recital is merely demonstrative of the nature of the title, and no otherwise material, the validity of the conveyance being no way involved in the accuracy of the statement, these words " *on or about*," and the following correlative ones, " *expressed to be* made," are of no utility.

(7) It is usual to affirm this when it is the case, because the legislature has made a great difference in the degrees of validity between a conveyance for a valuable consideration, and a voluntary conveyance. The common law made no distinction on this point. And though when the statute of uses incorporated the equitable use with the land, a consideration in money or money's worth became essential to a bargain and sale (*c*), yet the courts of law allowed it to be nominal, and gave efficacy to one of the slightest value; but the legislature subsequently made conveyances for the purpose of defrauding purchasers void as against such purchasers. (*d*) Conveyances made for good consideration and *bonâ fide*, are excepted from the act. But though the consideration of blood is a *good* consideration (*e*), the only considerations (in general) (*f*) which protect a conveyance from a subsequent one to a purchaser, are money or money's worth, and settlements before marriage. (*g*) When, however, the former is the consideration, the courts will not enter into its

(*b*) Prest. Sheph. 77. (*c*) Sup. 12. (*d*) 27 Eliz. c. 4. s. 2.

(*e*) See 2 Bl. Comm. 297.

(*f*) This qualification is necessary, as there are a few exceptions to the general rule. Lord C. J. Mansfield has said that, in general, the giving up a right without fraud is a valuable consideration. 2 Taunton, 83. Hence the release of an adverse claim to a litigated estate has been held such a consideration in a deed, as will avoid a former voluntary grant. Hill v. Bishop of Exeter, 2 Taunt. 69.

(*g*) See Woodie's case, Cro. Ja. 158. Goodright v. Moses, 2 Bl. R. 1019, where the settlements, adjudged within the statute, were after marriage.

adequacy, and it will support the conveyance, if not so small as to be palpably fraudulent. (*h*) Hence the general importance of a good or valuable consideration, in the sense which has been annexed to these words by the statute of Elizabeth. In the present instance, however, the mention of that fact is not very material; for although while the lands continue in the ownership of the voluntary grantee, the title is precarious from the possible subversion of his conveyance by a subsequent one to a purchaser, even though that purchaser has notice (*i*), yet if he acts upon his ownership before such subsequent conveyance from the original grantor, and grants the lands *bond fide*, the sub-purchaser cannot be affected. (*k*)

(8) The writer will generally use the word *hereditaments* alone, in referring to the "parcels," as it is the largest and most comprehensive expression of the subject matter that the law recognises. He omits the cumbrous load of referential terms, as "*hereinafter described, and also released, or otherwise assured, or intended so to be, with their appurtenances.*" As the single and simple object is identity, the constant repetition of this tiresome verbiage may be advantageously dispensed with. The word *premises* is in the phraseology of conveyancers equally comprehensive with *hereditaments*, but is for the most part used only as a term of retrospective reference.

(9) The words "and the fee-simple thereof, free from all incumbrances except as hereinafter mentioned," are generally inserted here, but are unnecessary, because the words "as hereinafter mentioned," refer to the subsequent specification, and have the legal effect of incorporating it with this recital.

(10) The contract recited raised an equitable fee in the purchaser, immediately on its execution; for in consequence of the fundamental principle of equity, that what is agreed to be done is considered as done (*l*), the vendor in entering into such a contract for the sale of lands, as equity will specifically perform, became a trustee for the purchaser in respect to the lands sold; the purchaser for the vendor as to the money. (*m*) Thus a contract effects an equitable conversion. Hence the purchaser before the conveyance of the legal estate has an equitable interest, which is grantable (*n*), descendible (*o*), and

(*h*) See Sugd. Vendors, 637. 7th Ed. and cases there cited.

(*i*) Evelyn v. Templar, 2 Bro. C. C. 148.

(*k*) 1 Sid. 133. Skin. 423. 1 East 92., applied to *equitable* rights in 9 Ves. J. 190. 1 Mer. 638.

(*l*) Francis, Maxim 13.

(*m*) 1 P. Wms. 737. 3 Ves. J. 255.

(*n*) 1 Ves. 220. 6 Ves. J. 352. 7 ibid. 265.

(*o*) 2 P. Wms. 629.

devisable. (*p*) But with respect to devises, the courts of equity, following the doctrine of law, hold a revocation to be effected by any material change of ownership; but they do not permit the mere consolidation of the equitable with the legal estate to be such a change. (*q*) Hence if the purchaser after a valid contract devises, and the lands are then conveyed to him in fee (*r*), the will without any republication is still good in equity, and the heir will be a trustee for the devisee. In permitting the will to be efficient under these circumstances, equity was led to a recognition of the equitable after its union and consolidation with the legal estate. The consequences are manifest. If, as in the present instance, the purchaser takes a conveyance to uses instead of in fee, he revokes a devise made between it and the contract (*s*); because the limitation of the use is a new moulding of that beneficial interest, which for this purpose equity continues to contemplate distinctly.

(11) I have marked this recital with inverted commas, because though usual it is immaterial; its object being to show by express declaration, what there would otherwise be an irresistible presumption of, viz., that it was at the purchaser's desire the vendor gave the inheritance particular modifications. When, therefore, the conveyance is to the use of the grantee in fee, a similar recital is never inserted. It is omitted in the following precedents, except in a few instances, where its retention seemed proper.

(12) When an indenture received its original form in an early and simple state of society, recitals were not in use; and the nominative case to the verb *witnesseth*, was the initial substantive of the deed; viz. this *Indenture*. It has, however, unfortunately happened that this form has been retained when there are recitals, and a consequent repetition of the expression "this indenture" in the testatum clause, which creates another nominative to the verb. Surely a gross grammatical error — an unmeaning phraseology, originating in an oversight, should not be retained from a blind regard to existing practice. Two modes of rectifying this solecism occur to me. The one by making the exordial language an independent proposition, by saying "This indenture *is* made:" The other by giving the word *witnesseth* precedency to the recitals, thus, "This indenture made, &c., *witnesseth that whereas*," &c. The operative part would then be introduced by "*Now* in pursuance," &c.

(13) It is usually said *well and truly* paid. But a payment destitute of those qualities being in fact no payment; those words are,

(*p*) 3 Salk. 85. Mose. 123. So of copyholds, 1 Cha. Ca. 39. (*q*) 3 Atk. 741.
(*r*) 1 Ves. J. 256, or to a trustee for him. Lofft. 609.
(*s*) 2 Ves. and Bea. 382., even when the contract is by parol, 4 Madd. 368.

it is conceived, idly used. That empty verbiage may be sometimes as dangerous as conciseness, is instanced in the words "for divers good causes and considerations," which, thrown into a purchase deed, are symptomatic of fraud. (*t*)

(14) This release, though conclusive at law, is not so in equity (*u*); and if the purchase-money be not paid after the execution of the conveyance, the vendor retains a lien on the lands. (*v*) This lien is an equitable interest, and therefore until the payment of the money, the purchaser is a trustee for the vendor; and as it is indistinguishable in substance from any other equitable interest, it follows that if a person deriving title from the purchaser, take the lands either without a valuable consideration, or with notice of the non-payment of the purchase-money, he becomes a trustee for the original vendor. And it is of course immaterial whether the notice is express or implied. And as, in general and correct practice, a receipt is indorsed on the deed when the vendor receives the money, the want of such indorsed receipt is held in equity to be implied notice of the non-payment of the consideration (*w*), and even the existence of such a receipt would not warrant a presumption of its payment, if there be *express* notice to the *contrary*. (*x*) The practical result of this deduction is evident. The want of an indorsed receipt puts a purchaser on his inquiry; and if the original purchase-money has been paid, the vendor must furnish him with proper evidence of that fact.

It has been doubted whether the vendor's lien is to prevail over an equitable mortgage, made by a deposit of the title deeds. Mr. Sugden (*y*) thinks the lien will yield to such a mortgage, and conceives the analogy of the case of Stanhope v. Earl Verney (*z*) decisive. It is admitted that an analogy exists, but apprehended that it is not so strong as Mr. Sugden imagines. In the case mentioned, Lord Northington decided that the custody of the deeds respecting a term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer, which equity would not take from him. But I humbly submit that this de-

(*t*) 2 Sch. and Lef. 483. (*u*) 1 Vern. 267. 3 Atk. 272.

(*v*) 1 Sim. and Stu. 444. Though he takes a bond, 2 Ves. 389, or promissory note, 2 Eq. Ca. Abr. 682. n. b. to (D.) 1 Madd. 346, unless the bond, &c. be in fact the consideration of the conveyance, as in Winter v. Lord Anson, 1 Sim. and Stu. 434. (*w*) 2 Prest. Conv. 429.

(*x*) For a receipt for the purchase-money, though signed by the vendor, is in equity of no avail, if the money be not actually paid. 2 P. Wms. 291.

(*y*) Vendors, 558. 7 Ed. (*z*) But. Co. Litt. 290. b.

cision itself is contrary to principle. Why in the common case of an assignment of an outstanding term, &c., to a second incumbrancer without notice, does equity refuse to assist the first incumbrancer? Because the second incumbrancer has equal equity, and *the legal estate:* it therefore remains passive; there is no ground for its interference. But when the subseqnent incumbrancer has *not* the legal estate, why should equity abandon the rule that *qui prior est tempore potior est jure?* Does the subsequent incumbrancer by obtaining the title deeds acquire a *superior* equity? That indeed is not contended for; it is because the title deeds and declaration of trust co-exist in the same person, that he is held to be in the same situation as if he had obtained an actual assignment of the term. But it is difficult to perceive on what principle the possession of the title deeds can give a priority to the subsequent incumbrancer, when it is conceded that it does not confer a superior equity, since it is certainly clear that at law that circumstance is quite immaterial, and consequently the courts of equity have *not* the same ground to act on, as when the subsequent incumbrancer has a legal estate coinciding with his equitable interest. If therefore a subsequent over-reaches a prior incumbrancer, who has merely an equitable interest, by uniting a legal estate to an interest equally equitable, *merely from equity being thereby rendered passive and quiescent*, upon what ground of analogy can it lay hold of a circumstance abstractedly immaterial, as the possession of the title deeds, and by reason of its alleged equivalence to an assignment, be called *into active operation*, and alter the relative rights of continuing equities? I submit, therefore, with great deference, that the case of Stanhope v. Earl Verney is contrary to the principles of equity. The only mode of supporting it would be, it is conceived, by showing generally that the mere fact of the possession of the title deeds gives a superior equity; a proposition which is certainly untenable, it being at length established that unless there is fraud, concealment, or gross negligence, which amounts to evidence of a fraudulent intention, the mere circumstance of parting with the title deeds is not a sufficient ground to postpone the prior incumbrancer. (*a*) But in thus bringing this rule to bear upon the case of Stanhope v. Earl Verney, which, if its application be just, destroys its specific authority, and throws it into a general class of cases, we obtain a *principle* on which the same conclusion may be firmly rested. For if a vendor signs the receipt, without receiving the purchase-money, and makes the purchaser, therefore, in every respect, the ostensible owner of the property, he is as much as any

(*a*) 6 Ves. 190.

man be, *guilty of that gross negligence which amounts to evidence of a fraudulent intention.* Not merely therefore on the artificial principles of equity, but on every ground of sound social policy, more especially on those considerations which are obviously suggested by the requisite aptitude of real property for the purposes of commerce, is the vendor's lien, when *apparently* extinguished by the signature of the receipt, to yield to the right of a *bonâ fide* equitable mortgagee. I have gone thus at length into the supposed analogy of this case to that of Stanhope v. Earl Verney, because the point is of the greatest importance, and it is therefore extremely desirable to fix it on its true foundation.

I shall conclude this note with observing, that though it is generally true that the receipt in the body of the conveyance is conclusive at law, and indeed an estoppel when the instrument is a deed (*b*), as a release must be, yet that if the general words refer to the recital of the *agreement* to pay, they do not estop, and are no bar to an action for the money, if it has in fact never been paid. (*c*)

(15) The extension of the release to the heirs, &c. of the releasee, though usual, is perfectly unnecessary.

(16) At the present day the reason for using a number of operative words in a release in fee has ceased. The only word among them of any importance or possible effect, was the word *grant*; and the object of using it was to give the instrument validity as a grant, if void as a release. But as it is now settled that the courts shall make that construction without the word grant, in the event of the deed's failing as a release (*cc*), which however it cannot do if the bargain and sale for a year be good, I have expunged this superfluous and surely, in modern times, inartificial provision, against the possible invalidity of the release.

(17) In some precedents the dower trustee is made a grantee of the seisin, and is expressed to pay a nominal consideration. But where he *is* made a grantee of the seisin, this practice is inartificial; for if the nominal consideration had any effect, it would carry the use to him, and by converting the common law estate to a legal interest, render it incapable of serving the ulterior uses. But the express limitation of use after the habendum prevents this effect. But as it is quite clear that a consideration is not essential to a common-law conveyance, and that therefore a seisin to uses may be

(*b*) Baker v. Dewey, 1 Bar. and Cres. 704. See also Styles, 462. and Rowntree v. Jacob, 2 Taunt. 144. But the receipt indorsed not being under seal is no estoppel, and its truth may be disputed. Per Best, J. 5 Bar & Ald. 612.

(*c*) Lampon v. Corke, 5 Bar. & Ald. 606.

(*cc*) Goodtitle v. Bailey, Cowp. 597.

granted without any, the practice has no useful object, and should be discontinued.

(18) It is generally said here *by an indenture;* but that statement may be omitted as immaterial, as a bargain and sale of a chattel interest need not, like a bargain and sale of a freehold estate, be by indenture.

(19) In recitals immaterial facts should be suppressed. We may expunge, therefore, the usual specification of the precise period for which the bargain and sale is made; for as the term which it creates is instanteously merged by the release, *so long as it confers the legal ownership*, (a fact which is affirmed) the commencement and prescribed duration of the term are not of moment.

For a similar reason, we may omit the words "by force of the statute," &c. That it is bargain and sale under the statute, is an inevitable presumption.

It is said to be doubtful in practice, whether this recital operates by way of evidence or estoppel. It should seem, however, that it must be considered as operating in the latter mode; for it is always a particular recital, the distinction between which and a general recital, in reference to the point of estoppel, is well established. (*d*) Admitting it to be an estoppel in general, it follows, as some appear to have thought, that when it cannot act in that manner, it is inadmissible evidence; whence they exclude it from questions concerning the issue in tail or persons in remainder or reversion. But as the only ground of this opinion is that the issue in tail, &c., do not claim from the tenant in tail, but the original donation, it should seem erroneous; for it concedes them to be on the footing of all others who do not claim from the grantor, as to whom it is merely held that the recital is not evidence when the original can be produced.

But in Ireland the recital is conclusive, and no bargain and sale prepared. (*e*)

(20) In all conveyances in fee (except reconveyances by trustees or mortgagees) the parcels are introduced into the operative part. Every thing intended to be conveyed should be particularly mentioned in its proper order, such as manors, messuages, &c., and be described by their situation, county, parish, number of acres, and

(*d*) Vid. Willes R. 11, 12. There are however some general sayings to the contrary, as in Co. Litt. 352; but the reason there given, viz., that an estoppel is no direct affimation, is inapplicable to a particular recital, which certainly *is* a direct affirmation. In confirmation of Willes R. 11, 12, see Rol. Abr. 872. Cro. Eliz. 756, 757. Styles, 103.

(*e*) 2 Prest. Convey. 444.

boundaries, and in whose tenure and occupation. (*f*) Sometimes, and very properly, the hundred, tithing, and vill, are likewise mentioned: for even now, when parishes, though originally an ecclesiastical division, are recognised in civil matters, it is held that if one convey all his lands in *Street*, which is the name both of a parish and a vill, and in both of which the grantor has lands, only those in the vill will pass. (*g*) By the exclusive recognition of the vill in this case, the intention of the parties is undoubtedly thwarted; and if at the present day courts of common law would deem themselves bound to apply the name of the place to the vill, in consequence of vills being one of the common law divisions of the kingdom, and parishes not, I conceive that courts of equity would, if there be a consideration to ground their jurisdiction, interpose to prevent the very serious consequences which might otherwise ensue an omission apparently so trifling, and a distinction so obsolete. For though at law no more will pass than is well described, yet, except as against any issue in tail or remainder-men whose title is not through the vendor, equity will, when the agreement can be proved, correct errors and supply omissions, by decreeing the vendor to convey the unincluded parcels. (*h*) And the vendor has a similar equity against the purchaser if any thing has been unintentionally vested in him. (*i*) But both are cases of great difficulty, and equity will proceed in them with extreme caution; for the court ought to consider what would have been done if previous to the execution of the conveyance the question had been put to it what conveyance should be made in performance of the agreement. But when the agreement is recited in the conveyance and is exceeded, the court will without doubt rectify the error, because it has clear evidence on the face of the instrument itself of the agreement intended to be effectuated. (*k*)

In respect to the manner of describing it may be observed generally:

1. That the description of the former conveyance should be adopted; and when divisions or other alterations make a new description desirable, it is, even for the sake of preserving evidence of this identity, proper to append it to, not substitute it in the place of, the original description.

(*f*) 4 Cruis. Dig. 281. 3 Ed. (*g*) 2 Roll. Abr. 54.

(*h*) See 2 Prest. Conv. 447. But the observation referred to is too general. Mr. Sugden's proposition (Vend. 295. 7 Ed.) is a more accurate deduction from the authorities.

(*i*) Finch, 80.

(*k*) See Lord Eldon's judgment in Beaumont v. Bromley. 1 Turner, 52—54.

2. That when a new description is made, it should begin with a general outline of the parcels, and then proceed to particularize; in order that the maxim *falsa demonstratio non nocet* may render an error in the detail immaterial.

It is common to add the words "more or less" and "by estimation," after mentioning the quantity of land conveyed. It is right to put purchasers on their guard against the effect of these expressions, since they now seem to have a broader construction than they naturally import, which is only a small difference one way or the other. In a late case, where the estate was stated to contain *by estimation* forty-one acres *be the same more or less*, and on an admeasurement the quantity proved to be only between thirty-five and thirty-six acres, and (the contract resting *in fieri*) the purchaser claimed an abatement, the Master of the Rolls decided against the claim; resting his judgment on the *joint* effect of those words. (*l*) The argument is stronger from a contract to a conveyance. The meaning of the words "more or less" in a *conveyance* is however not settled by the decisions; there are two conflicting cases, the one making the quantum of difference immaterial, on account of its being the purchaser's laches (*m*); the other cutting down the import of the expression to a small deficiency, or (as the court said) *reasonable* quantity. (*n*)

(21) I have here, as in the bargain and sale, omitted the multitude of general words that are usually poured in here, as being all comprised in the word "appurtenances." But these and the succeeding forms are given in the appendix.

(22) The clause of reversions is likewise omitted as a useless form, even when a reversion or remainder is the subject of the grant; for though by the grant of a reversion or remainder nothing will pass but the identical interest purported to be conveyed, so that an error in the description of it is fatal, yet it is settled that either of those expectant estates will pass under a conveyance of the lands. (*o*)

We may likewise omit the clause of "all the estate," as it can never of itself be, in a release in fee, the efficient part of the assurance. In a will, a gift of all the testator's estate imports a fee; but in a deed (as is well known) a fee cannot be created without the

(*l*) Winch v. Winchester, 1 Ves. & Bea. 375. A specific performance, however, was not decreed, in consequence of collateral evidence of fraud, it appearing that a declaration by the auctioneer deceived the purchaser; for the seller knowing the true quantity, is not allowed *to practise a fraud* through the medium of those words. See 1 Cam. Ca. 337.

(*m*) 2 Freem. 106.

(*n*) Owen, 133.

(*o*) Sup. 15.

word "heirs;" and if the *lands* be limited to the grantor and his heirs, a fee-simple is created as much as if the *estate* in them had been limited in the same manner. There is one case in which the word "estate" may have a *restraining* power and *frustrate* the intention of the parties; and that is when a man is tenant for life or years, and the person in remainder or reversion *confirms* his *estate* to him and his heirs, without confirming *the land*. According to the highest authorities the mistake is fatal, and the particular estate not enlarged. (*p*)

(23) I have marked this clause with inverted commas, because in the form which this release assumes it may be omitted, except, as it has been said, when the grantor retains any part of the lands, they relate to (*q*); for unless that be the case, there is in this precedent no obstruction to the general rule that the deeds follow the land. The only exception to that rule is, it is believed, in the case of a warranty by the vendor, when, as he thereby undertakes to defend the title, he is properly allowed by the law to retain the muniments (*r*): but warranties have fallen into disuse, at least in conveyances by tenants in fee.

Here, however, it should be noticed, that since the general introduction of releases to uses, and the attraction of the deeds to the common law estate of the releasee, instead of to the use or legal estate (*s*), an express grant of them to the cestuique use is proper, when the seisin is conveyed to a third person instead of (as is now the usual and most eligible practice) to the purchaser himself. But even this doctrine (and on good grounds) has been questioned by great authorities. (*t*)

(24) The attachment to phrases we have been long accustomed to is so strong, that though the words "*and to hold*" have been, since the abolition of tenures, lifeless verbiage, I have not expunged them,

(*p*) Litt. 524. 545. Plow. 540. Mr. Preston, in his edition of the Touchstone, 316, makes "a *quære* whether this case is law at present." But the ancient distinction has never been shaken.

(*q*) Mr. Preston draws this conclusion from Field v. Yea, 2 Dur. & E. 708. (2 Con. 466.) but though the position may be tenable on principle, the writer cannot acquiesce in the legitimacy of the inference. He will not discuss that case here: suffice it to say, that it does not appear that the attention of the Court was drawn to this point. Lord Kenyon certainly said that the defendant (who had purchased part of an estate, and in whose conveyance the deeds were not granted) "had no right to the deeds at the time of his purchase." But note, that the rest of the estate was, at the time of that purchase, in a mortgagee, who had possession of them;—a material fact, surely, and on which some stress appears to have been laid. The decision in Field v. Yea, appears to the writer open to much criticism.

(*r*) 1 Rep. 1.

(*s*) 1 Inst. 6. a. n. 4.

(*t*) 1 Inst. 6. a. n. 4.

but only marked them with inverted commas to stand or fall as the draftsman pleases.

The office of the habendum is only to limit the certainty of the estate granted. It follows that nothing can be granted in it; consequently the introduction of any new matter into the clause is void. Hence the propriety of words of reference. (*u*)

With respect to the *limitation of estates*, the following general observations are submitted to the reader.

1. If the limitation in the premises creates an express estate, which the habendum is *inconsistent with and in abridgment of*, as if the former be a fee-simple or fee-tail, and the latter an estate for life, the habendum is void, and an estate of inheritance is effectively created (*v*); for as the habendum is not an *essential* part of the deed, its office may be anticipated and supplied by the premises. But if the premises limit a fee-simple, and the habendum an estate tail (*w*) or descendible freehold (*x*), the latter is good, because the habendum is not then *inconsistent* with, but in *qualification* of the premises.

2. But if the limitation of the habendum is more extensive than that in the premises, it is valid; for as it is not in *abridgment* of the prior estate, its *inconsistency* is immaterial. If therefore lands are granted in the premises to A. for life, habendum to him in fee or in tail, the estate for life is instantly merged. (*y*) But if the antecedent estate be in tail, which does not admit of merger (*z*), and the limitation of the habendum be in fee, the grantee has both estates at once; — an estate tail with a fee expectant thereon by way of remainder. (*a*)

3 But if in a feoffment or bargain and sale enrolled, the only assurances by matter in pais which, to pass a freehold, require to be perfected by a ceremony, the habendum limits an estate for years, it countervails the premises, though they create an estate in fee in tail or for life by express terms, and to which therefore the estate in the habendum is repugnant; for the assurance is perfected instantaneously, as to the estate for years, by the mere delivery of the deed. (*b*)

4. If the estate created in the premises be a freehold by implication of law, and the habendum limit an express estate for years or

(*u*) A brief enumeration of the parcels is usual; but a general reference is sufficient.
(*v*) Plowd. 153.
(*w*) 8 Rep. 154. b. 1 Roll. Abr. 68.
(*x*) T. Jones, 4.
(*y*) 1 Inst. 299. a.
(*z*) Plowd. 296. 2 Rep. 61. a.
(*a*) 8 Rep. 154. b. 1 Inst. 21. a.
(*b*) 2 Rep. 23. See also 2 Sand. Uses, 315—17.

at will, the latter will prevail (*c*), on the principle that *expressio facit cessare tacitum*. And as the only estate which arises by construction of law, when lands are given generally in a deed, and the instrument possesses the requisitions to a transfer of freeholds, is an estate for life, it follows that such an implied estate in the premises will yield to an express limitation of a *larger* estate in the habendum. But this proposition may be referred to another and stronger ground; for, as we have seen, the habendum will extinguish a *minor* estate in the premises, even when created by express terms.

5. If lands be granted *generally*, and the habendum create a freehold *in futuro*, the conveyance will be void; for as the habendum would prevail over the premises if it had legally limited an express estate, it must have a similar effect when the limitation in it is void. (*d*) But (by parity of reason) if the premises create an *express* estate, though without mentioning the period of its commencement, and the habendum limit it from a future time, the latter will be void, and by consequence the estate in the premises well created. (*e*)

As however in bargains and sales, and covenants to stand seised, the habendum is itself the future limitation of a use, and as uses may, under certain restrictions, be limited *in futuro*, it follows that when the grant in the premises is general, the habendum is effectual, and the estate which it creates, valid. And as the doctrine established in the case of Carter v. Madgwick (*f*) does not seem in any way founded on the principle *res magis valeat quam pereat*, but on that which has been mentioned, we must treat the habendum in a bargain and sale, or covenant to stand seised, as void when it limits an estate *in futuro*, in contravention of an *express* estate in the premises, granted so as to take effect immediately. It need hardly be added, that these remarks on bargains and sales, and covenants to stand seised, are inapplicable to any conveyance which passes the seisin, whether uses are declared thereon or not; for the seisin, though of an evanescent nature, and (as it has been termed) conduit pipe to uses, is the common-law estate, and possessed of its original qualities. Hence the inference which has been stated, does not extend to a bargain and sale in execution of a statutable or common-law au-

(*c*) 1 Inst. 83. a. 2 Rep. 55. a. (*d*) 2 Co. 55. a. b. Cro. Eliz. 254, 255.
(*e*) 3 Lev. 339. Hob. 171. Moor, 881. pl. 1236. Goodtitle v. Gibbs, 5 Bar. & Cres. 709.
(*f*) 3 Lev. 339. Jarman v. Orchard, Skin. 528. Salk. 346. Show. P. C. 199, is founded on the same principle with Carter v. Madgwick, per Abbott, C. J. 5 Bar. & Cres. 718.

thority, but only to those which derive their existence as conveyances from the statute of uses.

(25) The grantee ought, of course, to be named in this clause. It is true, generally, that a stranger cannot be introduced into it (*g*); but to this rule there are three exceptions. 1st, The case of a remainder, 2d, Of frank marriage (which has fallen into disuse.) 3d, When no name is mentioned in the premises. (*h*)

When the grant is to several persons, the habendum may in general sever their tenancy; but in the modification, as in the limitation of an estate, the habendum is void if repugnant to the premises. Although, therefore, in a conveyance to two persons, habendum the one moiety to one, and the other moiety to the other, the habendum makes them tenants in common (*i*), in consequence of the express declaration overcoming the implication of law in the premises, which created a joint-tenancy, yet if in this case the habendum had given ten acres to one, and ten to the other, it would have been rejected for repugnancy. (*k*)

Mr. Preston observes, that at this day the estate is more commonly modified by a declaration of the use than by the grant. It should be noticed, however, that if there be a conveyance to A. and B. and their heirs, habendum to them and their heirs to the use of them as tenants in common, it is incorrect to consider the modification as produced by a declaration of use. In the case put, from the seisin and use being in the same persons, A. and B. are tenants in common, and take not by the statute of uses, but by the common law (*l*): so that the limitation of use is in legal consideration connected with, and a part of the habendum. But if there be a conveyance to A. and his heirs, habendum to him and his heirs, to the use of him and the heirs of his body, he takes an estate tail, not by the habendum, but the declaration of use, because he is in under the statute. (*m*) Yet if in this case the clause following the habendum give an estate for life or years, the party is in by the common-law, because these particular estates are not within the reasoning which applies to estates tail. (*n*) This distinction might be still further illus-

(*g*) 2 Roll. Abr. 67.
(*h*) 1 Inst. 21. a.
(*i*) Co. Litt. 183. b. 190. b.
(*k*) 1 P. Wms. 19.
(*l*) See Doe v. Prestwidge, 4 Man. & Sel. 178, but there the limitation was to two, and their heirs, as tenants in common, to the use of them and their heirs, and it was held they were in by the common-law as tenants in common. But the principle is the same.
(*m*) 13 Rep. 56. Bac. Read. 63.
(*n*) Bac. Read. 63. (Sed vid. 1 Prest. Est. 179.)

trated; but the consideration of it would lead us too far from the point before us, into a refined and abstruse branch of learning.

(26) It is generally added, "*upon such trusts;*" but, it is conceived, inaccurately; for the grantee of the common-law estate cannot hold the lands as trustee or legal owner, when uses either result from, or are declared upon his seisin. The only mode that occurs to me at present, in which the ostensible grantee to uses can be a trustee, is when the common-law estate has not been conveyed to him, but only an equitable interest; and in that case, the confinement of the declaration to uses in point of expression, would not have the effect of obstructing the operation of equity.

(27) This power of appointment is now almost invariably inserted in purchase conveyances of freehold property. A few observations explaining its nature and operation, as compendiously as possible, are submitted to the reader.

1. The power is perfectly unlimited; it does, therefore, in fact confer an ownership tantamount to the fee; and consequently the appointment can never, by connecting itself with the original conveyance, be a medium of that justly abhorred suspension of alienation, which the law terms a perpetuity. It follows that any limitation which would be good in the instrument creating the power, is equally so in the appointment in pursuance of it. (*o*) Hence if the appointment be to A. (a person unborn at the time at which the instrument containing the power was made), for life, remainder to his first and other sons in tail, the limitation is good. This is now an established point of difference between general and special powers; and as it flows from the fundamental principle which has been laid down as applicable to the former, there appears to have been no room for the doubt which has existed with many eminent gentlemen, of the validity of the limitations which have been stated. Their conclusion was drawn from the derivative nature of an appointment, and its retrospective relation to the instrument creating the power. But that reasoning was too straight-laced, and the technical rule which supported it, has, in this respect, properly given way to general convenience.

2. Another consequence of this general power being analogous to an ownership is, its transferability. (*p*) Hence it is an exception to the rule, that *delegatus non potest delegare;* in this respect differing, of course, from a special power. Hence if there be a conveyance to such uses generally, as A. shall appoint, and he appoints to such uses as B. shall appoint, the power is effectually transferred,

(*o*) See Sugd. Powers, 435, &c. 4th Ed. (*p*) Ibid. 179.

and when B. executes it, the use is served by the seisin of the original grantee to uses.

3. On the same principle, this general power may, on the bankruptcy of the donee, be executed by his assignees. (*q*)

With reference to the other classification of powers, it remains to be noticed that the power contained in a purchase deed is *appendant*; as it is evidently depends on the estate limited to the person to whom it is given; which is the criterion of such a power. (*r*)

These are its prominent and distinctive features; and we must stop here, as the limits of this note allowed but a summary view of its principal peculiarities.

(28) By the present doctrine (*s*) (not however firmly settled or cordially acceded to) (*t*), in order to enable the donee of general power to limit a rent-charge at law, the language of the power must extend to it. But in equity, a power to grant the land enables the donee to charge it. (*u*)

(29) This word, of course, involves a power of revocation. It is not, however, necessary to give this power expressly to the purchaser; for it is settled, 1st, that he may reserve it *toties quoties* (*v*), though not expressly authorised. (*w*) 2d. That this original power of revocation cannot affect an appointment by deed, made without any new reservation of such a power. (*x*)

(30) As writings sealed and delivered by the party are deeds, we may omit the words "*or writings.*" The extension of the power to devises is not only superfluous but unadvisable. I am not aware of any object to be accomplished by it, unless the solemnities with which the statute of frauds has invested wills of real property, are intended to be evaded. Whether that can be done is doubtful; and though the better opinion is, that in the case of a simple power without any specification, an instrument merely in writing may be a valid appointment, though of a testamentary nature (*y*); yet it is clear, that express mention of a will in the creation of the power, as a mode of exercising it, renders it necessary to clothe an appointment by will with the ceremonies prescribed by the statute of frauds. (*z*) But it is not usual, nor can it be desirable, to confer on the donee of the power a capacity of testamentary alienation contrariant to the po-

(*q*) 3 G. 4. c. 31. s. 3., continued by 6 G. 4. c. 16. s. 77.
(*r*) Sugd. Pow. 46, 4th Ed.
(*s*) Cro. Car. 38. Dy. 263.
(*t*) Amb. 393. Sugd. Pow. 450, 451, 4th Ed.
(*u*) Roberts v. Dixall, 2 Eq. Ca. Abr. 668. p. 19.
(*v*) 3 Keb. 7. Lane, 118.
(*w*) Cowp. 651. 1 Rep. 173. b.
(*x*) Hele v. Bond, Prec. Chanc. 474.
(*y*) Sugd. Pow. 212, 4th Ed.
(*z*) 1 P. Wms. 470. 2 P. Wms. 258.

licy of the act, which aimed at a suppression of the mischiefs consequent on secret and unauthenticated instruments.

I observed that the extension of the power to an appointment by will is superfluous and unadvisable. It is *superfluous* because, as will be seen by the limitations which succeed the power, a devise operating on the lands is competent (as such) to pass the whole estate; the remainder of the trustee being determined by the purchaser's death. It is *unadvisable*, because in wills ~~informally~~ prepared, there is never an allusion to the power, and rarely any thought of it; so that it would be a probable means of frustrating rather than effectuating the testator's intention, were the devise construed an execution of the power. And in wills *formally* prepared, the devise is frequently to uses, which if the instrument were construed an appointment would be mere trusts, because no seisin would then be given. But it must be added, that under the limitations of a modern purchase deed, to which alone our attention is now directed, a will made by the purchaser, without any reference to the power or intention to exercise it, would always be construed as a devise, and not as an appointment, on account of there being no kind of occasion for calling the power in aid. (*a*)

(31) Some years ago it was common to direct the appointment to be by deed, in *writing*, *signed*, sealed, &c.; and as the requisitions to the execution of a power are the law which governs it, however superfluous abstractedly (*b*), the attestation of the fact of signature became essential to the appointment, and the inadvertent omission to state it, frequently vitiated the instrument. We must however distinguish these cases into two classes; 1st, those in which the instrument is merely required to be signed, sealed, and delivered in the presence of the witnesses, in which all that is necessary is, that it should be in fact *signed*, &c., in their presence. (*c*) 2d, those in which to the above provision is added another, viz., the attestation of the execution, and in which it is necessary, therefore, that the attestation should express the signature. (*d*)

Hence, too, when the power is executed by a will, required to be signed and published in the presence of, and attested by witnesses, if there be an attestation of the signature only, the power is badly executed. (*e*)

(*a*) See the principle of Clere's case, 6 Rep. 17. Cro. Eliz. 877. Cro. Ja. 31.
(*b*) See Lord Ellenborough's observations in Hawkins v. Kemp, 3 East, 410.
(*c*) Sayle v. Freeland, 2 Ventr. 355. 2 Ch. Rep. 110. 1 Eq. Ca. Abr. 345.
(*d*) Wright v. Barlow, 3 Maule & Sel. 512.
(*e*) Stanhope v. Kier, 2 Sim. & Stu. 37.

To remedy defects in deeds arising from this source, the statute 54 G. 3. c. 118, was enacted, but its operation was retrospective; whence it is still proper to omit the requisition of signature.

(32) The attestation being required to be made by credible witnesses, their credibility is essential to the appointment. By analogy to the construction of the statute of frauds in respect to devises, it is inferrible that no witness would be deemed credible, who has an interest in establishing the appointment; from the same analogy, that his credibility at the time of making the appointment is not essential, and may be acquired afterwards, by a relinquishment of the interest limited to him thereunder. (*f*)

It appears to the writer that the words "by any deed or deeds lawfully executed," would in general cases be more eligible. This form has simplicity, and simplicity should not be departed from without a reason.

We may conclude our observations on this power with remarking, that its precautionary requisitions, though undoubtedly often beneficial as a preventive of fraud, are imposed *ex arbitrio;* as abstractedly a power may be executed by an unattested note in writing. (*g*) If defectively executed, equity will interpose when there is a meritorious consideration to ground its jurisdiction. We cannot here enter into an inquiry as to what considerations are sufficient to induce the intervention of equity; but it may be mentioned generally, that when those courts would supply the grant of a surrender, they will relieve against the defective execution of a power. (*h*) But, as peculiarly relevant to the limitations of a purchase deed, it may be observed that the reasoning of Sir Wm. Grant (*i*), however just in other cases, does not apply to those in which, like the present, the whole beneficial interest is in the donee of the power. That great Judge pointedly evinced the absurdity of the equitable doctrine which, in favour of a purchaser or creditor, remedies the defective execution of a power by compelling the person who is to take in default of appointment, and in whom, from the nullity of its execution, the legal estate vests, to convey to the appointee.

(33) The general object of these and the foregoing limitations, is to give the purchaser as ample a command as possible over the property, and at the same time to bar the dower of his wife. This end is completely attained. By the execution of the power these uses are prevented from arising, and a title is conferred on the appointee

(*f*) See Wyndham v. Chetwynd, 1 Burr. R. 414.
(*g*) 2 Salk. 467. 3 East, 440.
(*h*) 3 Bro. C. C. 229. 17 Ves. J. 297.
(*i*) 7 Ves. J. 506.

by way of shifting use, which is a new estate unconnected with, and independent of, the existing uses. Still, however, these ulterior uses are vested, though of course liable to be divested by the execution of the power. (*k*) And as the purchaser has the immediate legal freehold, and likewise the remainder in fee, subject only to an intervening remainder in a trustee for the purchaser's life, it follows that if (as sometimes inadvertently happens) instead of resorting to his power, he were merely to convey under the seisin, and grant the lands generally without joining the trustee in the conveyance, no other inconvenience would arise than the outstanding of the trustee's legal estate, for the narrow period of its prescribed duration. On the purchaser's death the intervening remainder to the trustee would cease, and the impediment to the complete union and consolidation of the first estate for life and remainder in fee would be removed. This interposed estate in the trustee is a sufficient bar of dower, because it is now settled, that it is a vested remainder (*l*), by reason of the propinquity of the possibility on which it is limited to commence, and its present capacity to take effect in possession, if the preceding freehold were to determine: so that (which is requisite to dower) (*m*) the purchaser has not during the coverture a seisin of the inheritance in possession.

(34) The limitation *to the assigns* of a tenant for life does not enlarge or strengthen his estate.

(35) It is important to observe the application of the statute of uses to the limitation to the purchaser, in default of appointment; for if, in consequence of the seisin and the use being united in his person, he was in by the common-law, the power would be void; for the doctrine of revocation of estates is peculiar to uses, and altogether unknown to the common-law. (*n*) The reason of admitting the statute is in order to avoid a fraction of estates (*o*); but when (as is frequently done) the seisin is conveyed to a trustee, there is of course no occasion for resorting to this principle, as then there is one person seised to the use of another.

(36) This limitation to the trustee and *his heirs* during the life of the purchaser is, I conceive, a preferable practice to that which is adopted by some of limiting to his executors or administrators; for in the former mode, it is barely possible that the intermediate remainder should fail or be suspended for want of a person legally entitled; but in the latter it is no way improbable, as the trustee may

(*k*) 1 Ves. 174. 4 Durn. & East, 39.
(*l*) 3 Lev. 437.
(*m*) Co. Litt. 32. b.
(*n*) Ibid. 237. a.
(*o*) Bac. Read. 66.

2. That when a new description is made, it should begin with a general outline of the parcels, and then proceed to particularize; in order that the maxim *falsa demonstratio non nocet* may render an error in the detail immaterial.

It is common to add the words "more or less" and "by estimation," after mentioning the quantity of land conveyed. It is right to put purchasers on their guard against the effect of these expressions, since they now seem to have a broader construction than they naturally import, which is only a small difference one way or the other. In a late case, where the estate was stated to contain *by estimation* forty-one acres *be the same more or less*, and on an admeasurement the quantity proved to be only between thirty-five and thirty-six acres, and (the contract resting *in fieri*) the purchaser claimed an abatement, the Master of the Rolls decided against the claim; resting his judgment on the *joint* effect of those words. (*l*) The argument is stronger from a contract to a conveyance. The meaning of the words "more or less" in a *conveyance* is however not settled by the decisions; there are two conflicting cases, the one making the quantum of difference immaterial, on account of its being the purchaser's laches (*m*); the other cutting down the import of the expression to a small deficiency, or (as the court said) *reasonable* quantity. (*n*)

(21) I have here, as in the bargain and sale, omitted the multitude of general words that are usually poured in here, as being all comprised in the word "appurtenances." But these and the succeeding forms are given in the appendix.

(22) The clause of reversions is likewise omitted as a useless form, even when a reversion or remainder is the subject of the grant; for though by the grant of a reversion or remainder nothing will pass but the identical interest purported to be conveyed, so that an error in the description of it is fatal, yet it is settled that either of those expectant estates will pass under a conveyance of the lands. (*o*)

We may likewise omit the clause of "all the estate," as it can never of itself be, in a release in fee, the efficient part of the assurance. In a will, a gift of all the testator's estate imports a fee; but in a deed (as is well known) a fee cannot be created without the

(*l*) Winch v. Winchester, 1 Ves. & Bea. 375. A specific performance, however, was not decreed, in consequence of collateral evidence of fraud, it appearing that a declaration by the auctioneer deceived the purchaser; for the seller knowing the true quantity, is not allowed *to practise a fraud* through the medium of those words. See 1 Cam. Ca. 337.

(*m*) 2 Freem. 106.

(*n*) Owen, 133.

(*o*) Sup. 15.

word "heirs;" and if the *lands* be limited to the grantor and his heirs, a fee-simple is created as much as if the *estate* in them had been limited in the same manner. There is one case in which the word "estate" may have a *restraining* power and *frustrate* the intention of the parties; and that is when a man is tenant for life or years, and the person in remainder or reversion *confirms* his *estate* to him and his heirs, without confirming *the land*. According to the highest authorities the mistake is fatal, and the particular estate not enlarged. (*p*)

(23) I have marked this clause with inverted commas, because in the form which this release assumes it may be omitted, except, as it has been said, when the grantor retains any part of the lands, they relate to (*q*); for unless that be the case, there is in this precedent no obstruction to the general rule that the deeds follow the land. The only exception to that rule is, it is believed, in the case of a warranty by the vendor, when, as he thereby undertakes to defend the title, he is properly allowed by the law to retain the muniments (*r*): but warranties have fallen into disuse, at least in conveyances by tenants in fee.

Here, however, it should be noticed, that since the general introduction of releases to uses, and the attraction of the deeds to the common law estate of the releasee, instead of to the use or legal estate (*s*), an express grant of them to the cestuique use is proper, when the seisin is conveyed to a third person instead of (as is now the usual and most eligible practice) to the purchaser himself. But even this doctrine (and on good grounds) has been questioned by great authorities. (*t*)

(24) The attachment to phrases we have been long accustomed to is so strong, that though the words "*and to hold*" have been, since the abolition of tenures, lifeless verbiage, I have not expunged them,

(*p*) Litt. 524. 545. Plow. 540. Mr. Preston, in his edition of the Touchstone, 316, makes "a *quære* whether this case is law at present." But the ancient distinction has never been shaken.

(*q*) Mr. Preston draws this conclusion from Field v. Yea, 2 Dur. & E. 708. (2 Con. 466.) but though the position may be tenable on principle, the writer cannot acquiesce in the legitimacy of the inference. He will not discuss that case here: suffice it to say, that it does not appear that the attention of the Court was drawn to this point. Lord Kenyon certainly said that the defendant (who had purchased part of an estate, and in whose conveyance the deeds were not granted) "had no right to the deeds at the time of his purchase." But note, that the rest of the estate was, at the time of that purchase, in a mortgagee, who had possession of them;—a material fact, surely, and on which some stress appears to have been laid. The decision in Field v. Yea, appears to the writer open to much criticism.

(*r*) 1 Rep. 1.

(*s*) 1 Inst. 6. a. n. 4.

(*t*) 1 Inst. 6. a. n. 4.

but only marked them with inverted commas to stand or fall as the draftsman pleases.

The office of the habendum is only to limit the certainty of the estate granted. It follows that nothing can be granted in it; consequently the introduction of any new matter into the clause is void. Hence the propriety of words of reference. (*u*)

With respect to the *limitation of estates*, the following general observations are submitted to the reader.

1. If the limitation in the premises creates an express estate, which the habendum is *inconsistent with and in abridgment of*, as if the former be a fee-simple or fee-tail, and the latter an estate for life, the habendum is void, and an estate of inheritance is effectively created (*v*); for as the habendum is not an *essential* part of the deed, its office may be anticipated and supplied by the premises. But if the premises limit a fee-simple, and the habendum an estate tail (*w*) or descendible freehold (*x*), the latter is good, because the habendum is not then *inconsistent* with, but in *qualification* of the premises.

2. But if the limitation of the habendum is more extensive than that in the premises, it is valid; for as it is not in *abridgment* of the prior estate, its *inconsistency* is immaterial. If therefore lands are granted in the premises to A. for life, habendum to him in fee or in tail, the estate for life is instantly merged. (*y*) But if the antecedent estate be in tail, which does not admit of merger (*z*), and the limitation of the habendum be in fee, the grantee has both estates at once; — an estate tail with a fee expectant thereon by way of remainder. (*a*)

3 But if in a feoffment or bargain and sale enrolled, the only assurances by matter in pais which, to pass a freehold, require to be perfected by a ceremony, the habendum limits an estate for years, it countervails the premises, though they create an estate in fee in tail or for life by express terms, and to which therefore the estate in the habendum is repugnant; for the assurance is perfected instantaneously, as to the estate for years, by the mere delivery of the deed. (*b*)

4. If the estate created in the premises be a freehold by implication of law, and the habendum limit an express estate for years or

(*u*) A brief enumeration of the parcels is usual; but a general reference is sufficient.
(*v*) Plowd. 153.
(*w*) 8 Rep. 154. b. 1 Roll. Abr. 68.
(*x*) T. Jones, 4.
(*y*) 1 Inst. 299. a.
(*z*) Plowd. 296. 2 Rep. 61. a.
(*a*) 8 Rep. 154. b. 1 Inst. 21. a.
(*b*) 2 Rep. 23. See also 2 Sand. Uses, 315—17.

at will, the latter will prevail (*c*), on the principle that *expressio facit cessare tacitum*. And as the only estate which arises by construction of law, when lands are given generally in a deed, and the instrument possesses the requisitions to a transfer of freeholds, is an estate for life, it follows that such an implied estate in the premises will yield to an express limitation of a *larger* estate in the habendum. But this proposition may be referred to another and stronger ground; for, as we have seen, the habendum will extinguish a *minor* estate in the premises, even when created by express terms.

5. If lands be granted *generally*, and the habendum create a freehold *in futuro*, the conveyance will be void; for as the habendum would prevail over the premises if it had legally limited an express estate, it must have a similar effect when the limitation in it is void. (*d*) But (by parity of reason) if the premises create an *express* estate, though without mentioning the period of its commencement, and the habendum limit it from a future time, the latter will be void, and by consequence the estate in the premises well created. (*e*)

As however in bargains and sales, and covenants to stand seised, the habendum is itself the future limitation of a use, and as uses may, under certain restrictions, be limited *in futuro*, it follows that when the grant in the premises is general, the habendum is effectual, and the estate which it creates, valid. And as the doctrine established in the case of Carter v. Madgwick (*f*) does not seem in any way founded on the principle *res magis valeat quam pereat*, but on that which has been mentioned, we must treat the habendum in a bargain and sale, or covenant to stand seised, as void when it limits an estate *in futuro*, in contravention of an *express* estate in the premises, granted so as to take effect immediately. It need hardly be added, that these remarks on bargains and sales, and covenants to stand seised, are inapplicable to any conveyance which passes the seisin, whether uses are declared thereon or not; for the seisin, though of an evanescent nature, and (as it has been termed) conduit pipe to uses, is the common-law estate, and possessed of its original qualities. Hence the inference which has been stated, does not extend to a bargain and sale in execution of a statutable or common-law au-

(*c*) 1 Inst. 83. a. 2 Rep. 55. a. (*d*) 2 Co. 55. a. b. Cro. Eliz. 254, 255.
(*e*) 3 Lev. 339. Hob. 171. Moor, 891. pl. 1236. Goodtitle v. Gibbs, 5 Bar. & Cres. 709.
(*f*) 3 Lev. 339. Jarman v. Orchard, Skin. 528. Salk. 346. Show. P. C. 199, is founded on the same principle with Carter v. Madgwick, per Abbott, C. J. 5 Bar. & Cres. 718.

thority, but only to those which derive their existence as conveyances from the statute of uses.

(25) The grantee ought, of course, to be named in this clause. It is true, generally, that a stranger cannot be introduced into it (*g*); but to this rule there are three exceptions. 1st, The case of a remainder, 2d, Of frank marriage (which has fallen into disuse.) 3d, When no name is mentioned in the premises. (*h*)

When the grant is to several persons, the habendum may in general sever their tenancy; but in the modification, as in the limitation of an estate, the habendum is void if repugnant to the premises. Although, therefore, in a conveyance to two persons, habendum the one moiety to one, and the other moiety to the other, the habendum makes them tenants in common (*i*), in consequence of the express declaration overcoming the implication of law in the premises, which created a joint-tenancy, yet if in this case the habendum had given ten acres to one, and ten to the other, it would have been rejected for repugnancy. (*k*)

Mr. Preston observes, that at this day the estate is more commonly modified by a declaration of the use than by the grant. It should be noticed, however, that if there be a conveyance to A. and B. and their heirs, habendum to them and their heirs to the use of them as tenants in common, it is incorrect to consider the modification as produced by a declaration of use. In the case put, from the seisin and use being in the same persons, A. and B. are tenants in common, and take not by the statute of uses, but by the common law (*l*): so that the limitation of use is in legal consideration connected with, and a part of the habendum. But if there be a conveyance to A. and his heirs, habendum to him and his heirs, to the use of him and the heirs of his body, he takes an estate tail, not by the habendum, but the declaration of use, because he is in under the statute. (*m*) Yet if in this case the clause following the habendum give an estate for life or years, the party is in by the common-law, because these particular estates are not within the reasoning which applies to estates tail. (*n*) This distinction might be still further illus-

(*g*) 2 Roll. Abr. 67.
(*h*) 1 Inst. 21. a.
(*i*) Co. Litt. 183. b. 190. b.
(*k*) 1 P. Wms. 19.
(*l*) See Doe v. Prestwidge, 4 Man. & Sel. 178, but there the limitation was to two, and their heirs, as tenants in common, to the use of them and their heirs, and it was held they were in by the common-law as tenants in common. But the principle is the same.
(*m*) 13 Rep. 56. Bac. Read. 63.
(*n*) Bac. Read. 63. (Sed vid. 1 Prest. Est. 179.)

trated: but the consideration of it would lead us too far from the point before us, into a refined and abstruse branch of learning.

(26) It is generally added, "*upon such trusts;*" but, it is conceived, inaccurately; for the grantee of the common-law estate cannot hold the lands as trustee or legal owner, when uses either result from, or are declared upon his seisin. The only mode that occurs to me at present, in which the ostensible grantee to uses can be a trustee, is when the common-law estate has not been conveyed to him, but only an equitable interest; and in that case, the confinement of the declaration to uses in point of expression, would not have the effect of obstructing the operation of equity.

(27) This power of appointment is now almost invariably inserted in purchase conveyances of freehold property. A few observations explaining its nature and operation, as compendiously as possible, are submitted to the reader.

1. The power is perfectly unlimited; it does, therefore, in fact confer an ownership tantamount to the fee; and consequently the appointment can never, by connecting itself with the original conveyance, be a medium of that justly abhorred suspension of alienation, which the law terms a perpetuity. It follows that any limitation which would be good in the instrument creating the power, is equally so in the appointment in pursuance of it. (*o*) Hence if the appointment be to A. (a person unborn at the time at which the instrument containing the power was made), for life, remainder to his first and other sons in tail, the limitation is good. This is now an established point of difference between general and special powers; and as it flows from the fundamental principle which has been laid down as applicable to the former, there appears to have been no room for the doubt which has existed with many eminent gentlemen, of the validity of the limitations which have been stated. Their conclusion was drawn from the derivative nature of an appointment, and its retrospective relation to the instrument creating the power. But that reasoning was too straight-laced, and the technical rule which supported it, has, in this respect, properly given way to general convenience.

2. Another consequence of this general power being analogous to an ownership is, its transferability. (*p*) Hence it is an exception to the rule, that *delegatus non potest delegare;* in this respect differing, of course, from a special power. Hence if there be a conveyance to such uses generally, as A. shall appoint, and he appoints to such uses as B. shall appoint, the power is effectually transferred,

(*o*) See Sugd. Powers, 435, &c. 4th Ed. (*p*) Ibid. 179.

and when B. executes it, the use is served by the seisin of the original grantee to uses.

3. On the same principle, this general power may, on the bankruptcy of the donee, be executed by his assignees. (*q*)

With reference to the other classification of powers, it remains to be noticed that the power contained in a purchase deed is *appendant*; as it is evidently depends on the estate limited to the person to whom it is given; which is the criterion of such a power. (*r*)

These are its prominent and distinctive features; and we must stop here, as the limits of this note allowed but a summary view of its principal peculiarities.

(28) By the present doctrine (*s*) (not however firmly settled or cordially acceded to) (*t*), in order to enable the donee of general power to limit a rent-charge at law, the language of the power must extend to it. But in equity, a power to grant the land enables the donee to charge it. (*u*)

(29) This word, of course, involves a power of revocation. It is not, however, necessary to give this power expressly to the purchaser; for it is settled, 1st, that he may reserve it *toties quoties* (*v*), though not expressly authorised. (*w*) 2d. That this original power of revocation cannot affect an appointment by deed, made without any new reservation of such a power. (*x*)

(30) As writings sealed and delivered by the party are deeds, we may omit the words "*or writings.*" The extension of the power to devises is not only superfluous but unadvisable. I am not aware of any object to be accomplished by it, unless the solemnities with which the statute of frauds has invested wills of real property, are intended to be evaded. Whether that can be done is doubtful; and though the better opinion is, that in the case of a simple power without any specification, an instrument merely in writing may be a valid appointment, though of a testamentary nature (*y*); yet it is clear, that express mention of a will in the creation of the power, as a mode of exercising it, renders it necessary to clothe an appointment by will with the ceremonies prescribed by the statute of frauds. (*z*) But it is not usual, nor can it be desirable, to confer on the donee of the power a capacity of testamentary alienation contrariant to the po-

(*q*) 3 G. 4. c. 31. s. 3., continued by 6 G. 4. c. 16. s. 77.
(*r*) Sugd. Pow. 46, 4th Ed. (*s*) Cro. Car. 38. Dy. 263.
(*t*) Amb. 393. Sugd. Pow. 450, 451, 4th Ed.
(*u*) Roberts v. Dixall, 2 Eq. Ca. Abr. 668. p. 19.
(*v*) 3 Keb. 7. Lane, 118. (*w*) Cowp. 651. 1 Rep. 173. b.
(*x*) Hele v. Bond, Prec. Chanc. 474. (*y*) Sugd. Pow. 212, 4th Ed.
(*z*) 1 P. Wms. 470. 2 P. Wms. 258.

licy of the act, which aimed at a suppression of the mischiefs consequent on secret and unauthenticated instruments.

I observed that the extension of the power to an appointment by will is superfluous and unadvisable. It is *superfluous* because, as will be seen by the limitations which succeed the power, a devise operating on the lands is competent (as such) to pass the whole estate; the remainder of the trustee being determined by the purchaser's death. It is *unadvisable*, because in wills *informally* prepared, there is never an allusion to the power, and rarely any thought of it; so that it would be a probable means of frustrating rather than effectuating the testator's intention, were the devise construed an execution of the power. And in wills *formally* prepared, the devise is frequently to uses, which if the instrument were construed an appointment would be mere trusts, because no seisin would then be given. But it must be added, that under the limitations of a modern purchase deed, to which alone our attention is now directed, a will made by the purchaser, without any reference to the power or intention to exercise it, would always be construed as a devise, and not as an appointment, on account of there being no kind of occasion for calling the power in aid. (*a*)

(31) Some years ago it was common to direct the appointment to be by deed, in *writing*, *signed*, sealed, &c.; and as the requisitions to the execution of a power are the law which governs it, however superfluous abstractedly (*b*), the attestation of the fact of signature became essential to the appointment, and the inadvertent omission to state it, frequently vitiated the instrument. We must however distinguish these cases into two classes; 1st, those in which the instrument is merely required to be signed, sealed, and delivered in the presence of the witnesses, in which all that is necessary is, that it should be in fact *signed*, &c., in their presence. (*c*) 2d, those in which to the above provision is added another, viz., the attestation of the execution, and in which it is necessary, therefore, that the attestation should express the signature. (*d*)

Hence, too, when the power is executed by a will, required to be signed and published in the presence of, and attested by witnesses, if there be an attestation of the signature only, the power is badly executed. (*e*)

(*a*) See the principle of Clere's case, 6 Rep. 17. Cro. Eliz. 877. Cro. Ja. 31.
(*b*) See Lord Ellenborough's observations in Hawkins v. Kemp, 3 East, 410.
(*c*) Sayle v. Freeland, 2 Ventr. 355. 2 Ch. Rep. 110. 1 Eq. Ca. Abr. 345.
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To remedy defects in deeds arising from this source, the statute 54 G. 3. c. 118, was enacted, but its operation was retrospective; whence it is still proper to omit the requisition of signature.

(32) The attestation being required to be made by credible witnesses, their credibility is essential to the appointment. By analogy to the construction of the statute of frauds in respect to devises, it is inferrible that no witness would be deemed credible, who has an interest in establishing the appointment; from the same analogy, that his credibility at the time of making the appointment is not essential, and may be acquired afterwards, by a relinquishment of the interest limited to him thereunder. (*f*)

It appears to the writer that the words "by any deed or deeds lawfully executed," would in general cases be more eligible. This form has simplicity, and simplicity should not be departed from without a reason.

We may conclude our observations on this power with remarking, that its precautionary requisitions, though undoubtedly often beneficial as a preventive of fraud, are imposed *ex arbitrio*; as abstractedly a power may be executed by an unattested note in writing. (*g*) If defectively executed, equity will interpose when there is a meritorious consideration to ground its jurisdiction. We cannot here enter into an inquiry as to what considerations are sufficient to induce the intervention of equity; but it may be mentioned generally, that when those courts would supply the grant of a surrender, they will relieve against the defective execution of a power. (*h*) But, as peculiarly relevant to the limitations of a purchase deed, it may be observed that the reasoning of Sir Wm. Grant (*i*), however just in other cases, does not apply to those in which, like the present, the whole beneficial interest is in the donee of the power. That great Judge pointedly evinced the absurdity of the equitable doctrine which, in favour of a purchaser or creditor, remedies the defective execution of a power by compelling the person who is to take in default of appointment, and in whom, from the nullity of its execution, the legal estate vests, to convey to the appointee.

(33) The general object of these and the foregoing limitations, is to give the purchaser as ample a command as possible over the property, and at the same time to bar the dower of his wife. This end is completely attained. By the execution of the power these uses are prevented from arising, and a title is conferred on the appointee

(*f*) See Wyndham v. Chetwynd, 1 Burr. R. 414.
(*g*) 2 Salk. 467. 3 East, 440.
(*h*) 3 Bro. C. C. 229. 17 Ves. J. 297. (*i*) 7 Ves. J. 506.

by way of shifting use, which is a new estate unconnected with, and independent of, the existing uses. Still, however, these ulterior uses are vested, though of course liable to be divested by the execution of the power. (*k*) And as the purchaser has the immediate legal freehold, and likewise the remainder in fee, subject only to an intervening remainder in a trustee for the purchaser's life, it follows that if (as sometimes inadvertently happens) instead of resorting to his power, he were merely to convey under the seisin, and grant the lands generally without joining the trustee in the conveyance, no other inconvenience would arise than the outstanding of the trustee's legal estate, for the narrow period of its prescribed duration. On the purchaser's death the intervening remainder to the trustee would cease, and the impediment to the complete union and consolidation of the first estate for life and remainder in fee would be removed. This interposed estate in the trustee is a sufficient bar of dower, because it is now settled, that it is a vested remainder (*l*), by reason of the propinquity of the possibility on which it is limited to commence, and its present capacity to take effect in possession, if the preceding freehold were to determine: so that (which is requisite to dower) (*m*) the purchaser has not during the coverture a seisin of the inheritance in possession.

(34) The limitation *to the assigns* of a tenant for life does not enlarge or strengthen his estate.

(35) It is important to observe the application of the statute of uses to the limitation to the purchaser, in default of appointment; for if, in consequence of the seisin and the use being united in his person, he was in by the common-law, the power would be void; for the doctrine of revocation of estates is peculiar to uses, and altogether unknown to the common-law. (*n*) The reason of admitting the statute is in order to avoid a fraction of estates (*o*); but when (as is frequently done) the seisin is conveyed to a trustee, there is of course no occasion for resorting to this principle, as then there is one person seised to the use of another.

(36) This limitation to the trustee and *his heirs* during the life of the purchaser is, I conceive, a preferable practice to that which is adopted by some of limiting to his executors or administrators; for in the former mode, it is barely possible that the intermediate remainder should fail or be suspended for want of a person legally entitled; but in the latter it is no way improbable, as the trustee may

(*k*) 1 Ves. 174. 4 Durn. & East, 39.
(*l*) 3 Lev. 437.
(*m*) Co. Litt. 32. b.
(*n*) Ibid. 237. a.
(*o*) Bac. Read. 66.

die intestate, and no administrator be appointed to his effects. It is observable, that the heir cannot take unless specially named, because otherwise the statute has directed the lands to devolve on the personal representatives. (*p*) But notwithstanding the general direction of the legislature, it would, in the present case be improper to omit an express nomination of the executors, &c., of the trustee, if it be intended that the remainder shall go to them; for of a remainder and other things which lie in grant, there could not at the common law have been any occupancy (*q*), and on the ground that the object of the legislature was only to obviate the evils resulting from (as it has been called) the scrambling for estates, some have supposed that the statutes alluded to, do not extend to them. (*r*) Others, however, have denied this (*s*), and their opinion appears to be law. (*t*)

We shall not here examine the authorities on the subject, because that has been already done in a modern treatise of celebrity. (*u*) We may, however, notice that that learned writer who concludes in favour of the capacity of the trustee's executor to take as *special* occupant, has vitiated his reasoning, by assuming that the limitation is of a corporeal hereditament, and *therefore* distinguishable from the case of a rent, of which it has been held that an executor cannot be a special occupant, even when expressly named (*v*); whereas, if *that* decision be just, it certainly governs the present point, as this is the case of a *remainder*, which is in its essence an incorporeal hereditament; as is proved by its lying in grant.

We may remark, by the way, that Sir William Blackstone seems to have supposed, that title by special occupancy was restricted to the *heir* (*w*); and the statutes of 29 Car. 2. c. 3. & 14 G. 2. c. 20., seem both to have been formed under the same erroneous impression. For the legislature evidently intended the estate to be distributable by the personal representative in whatever manner it devolved on him; but if the statutes were construed *strictly*, a nomination of the

(*p*) 29 Car. 2. c. 3.

(*q*) Salter v. Boteler, Vaugh. 199. 1 Salk. 189.

(*r*) Withers v. Withers, Ambler, 151.

(*s*) See Cox's P. Wms. 264. n. D. for the statute was *likewise* made to continue the estate during the life of the cestuique vie.

(*t*) But it still seems there can, in strictness, be no special occupancy of an incorporeal hereditament; though if the executor be named in the grant, he may be *quasi* occupant. 7 Ves. 440, 448. Vid. Vaugh. 187. Har. Co. Litt. 41. n. 241.

(*u*) Sugd. Pow. 198. (1), 4th Ed.

(*v*) See Roll. Abr. tit. Occup. (G.)

(*w*) 2 Comm. 260.

executor would prevent their application, by vesting the estate in him as a special occupant. (*x*)

It only remains to say that when the limitation of an estate *pur auter vie*. (even in corporeal hereditaments) is to the *heirs, executors, and administrators,* the heir will take as special occupant in preference to the executor. (*y*)

(37) It is generally added, "and to the express intent that the present or any future wife of the said Edward East may not be entitled to dower." But the expression of this intent is superfluous. The dower of the purchaser's wife is barred by the intervening vested remainder, and whether it were in a trustee or a stranger, the same effect is produced.

(38) *Idem proximo antecedenti semper refertur.* This maxim renders the word "*same*," a medium of neatness and precision.

(39) Few require to be informed that the emphatic expression "*and assigns for ever*," is in truth nugatory. Pursuing the precision which principle puts within our reach, I have made the limitation simply to the purchaser and *his heirs;* these words being those on which the law lays stress (*z*), and to which it gives the effect of expanding a mere freehold into a fee-simple. This rule has but very few exceptions; none in its application to individuals in their natural capacity.

(40) The following are the covenants regularly inserted in a release in fee to uses; when the instrument is an appointment, and release, the covenants, as we shall hereafter see, are differently modified.

(41) Were the heir not mentioned in these covenants, he would not be bound by them (*a*); but the executors and administrators are bound without being named. (*b*) As to the *general* doctrine with respect to the personal representatives; — whether they are bound or not, depends upon the intention deducible from the instrument; as if, for instance, a lessee were to covenant to repair the demised premises without other words, it seems that it is personal to him, and binds him only during his life; but the addition of the words during the term, has the effect of charging the executors. (*c*) Other cases might be put to illustrate this proposition, which is the princi-

(*x*) This was the difficulty in Ripley v. Waterworth, 7 Ves. Jun. 425. But that decision was according to the intention of the legislature.

(*y*) Atkinson v. Baker, 4 Durn. & East, 299.

(*z*) Litt. s. 1. 2 Bl. Comm. 107.

(*a*) Bro. Covenant, 38. Dyer, 257.

(*b*) The learned editor of the Commentaries, (16th Ed.) 2 vol. 304. n. 4., erroneously supposes that they are not bound when not named, if the object of the covenant relates to the realty. But see Touch. 177, 178. The point is quite clear.

(*c*) Touch. 178.

ple on which they are grounded. But of course if, even in the instance given, the covenant be broken during the covenantor's life, the personal representatives are liable to the amount of the assets, though not expressly charged.

(42) Inherent covenants, like these, run with the land, though the *grantee only* is named. But when a covenant, from the nature of it, or the circumstances under which it is entered into, will not run with the land, that quality cannot be conferred on it by express mention of the grantee's assigns. (*d*) The same observation applies to the words "appointees." We *might* omit, therefore, the usual words "appointees, heirs, and assigns," as in every view useless.

Some learned writers, however, appear to have supposed that it is necessary to make the covenant with the grantee *and his heirs*, in order to communicate its benefit to the assignee. (*e*) *That*, however, they of course acknowledge to be sufficient. And though the idea seems to be altogether erroneous, inasmuch as it has been negatived by an express decision (*f*), the author would recommend the covenant to be with the purchaser *and his heirs*, so long as the simple nomination of the covenantee is deemed insufficient by those whose opinions are entitled to regard.

(43) A purchaser is never entitled to unlimited covenants, or those which extend to the acts of all mankind. In the precedent before us, the covenants are restrained to the acts of the grantor himself, on account of his being the last purchaser for a valuable consideration, and a purchaser can demand no more. (*g*) In this point the practice of conveyancers and the rules of equity agree; in another, as we shall hereafter see, they unfortunately differ.

(44) We may omit the first ordinary covenant, that the grantor is seised in fee, as involved in this, which has been said to be synonymous with it. It does not, however, follow that because one is seised in fee he can convey an indefeasible fee. For if his estate be a fee, but subject to a condition at common law, he has less power of effective alienation than a tenant in tail. Again, although the common-law knows no mode of conferring a limited interest in lands without leaving a reversion in the grantor, or creating a remainder immediately expectant on its determination, both which pre-suppose the antecedent estate to be less than the fee, the doctrine of uses and devises, in defiance of the axiom that a fee-simple is the whole

(*d*) Clayt. 60. Palm. 558.
(*e*) Sugd. Vend. 561. 7th Ed.
(*f*) Lougher v. Williams, 2 Lev. 92., which Mr. Sugden has not adverted to.
(*g*) 2 Bos. & Pull. 22.

estate, allows of limitations subsequent to it, provided they are to commence within the period permitted for keeping property in an inalienable state. Moreover the taker of such a fee has less power of alienation than a tenant in tail: for it is settled that he cannot by any conveyance tortious or innocent, of record or *in fait*, affect a future use or executory devise (*h*); whereas a tenant in tail may, by suffering a recovery, destroy every limitation ulterior to his estate. (*i*) But a lease and release by either of them has the same effect, that of passing a fee commensurate with that from which it is derived, and determinable by the entry of the ulterior limitee upon the happening of the event on which his estate becomes vested in possession. As the covenant that the grantor is seised in fee is generally worded, it is however co-extensive with the covenant, that he has right to convey; but as it is *only* so, it is superfluous.

Of course this covenant, if broken at all, is broken as soon as it is made. Still, however, an action may be supported on it by an heir or devisee; for the courts have regarded the breach as *toties quoties* (*k*); as commensurate in duration with the defect itself.

(45) It is not necessary to repeat the restrictive words in this and the following covenants; for though a general covenant is not cut down by the qualifying language of a subsequent one (*l*), it is fully settled that the express qualification of the first of several covenants which have the same object and similar natures, and concern the same thing, does by implication extend to all of them. (*m*)

(46) The words of this covenant, abstractedly, are sufficiently general to comprise tortious as well as rightful evictions; but it is now established on principles of sound policy, that it extends to the latter only (*n*), except, 1st, when it indemnifies against the acts of particular persons by name (*o*), or 2d, when the interruption proceeds from the covenantor himself. (*p*) This construction precludes collusion, without bearing hard upon the covenantee; for *he* has his remedy against the wrong-doer. But when the covenant is levelled at the acts of particular persons, the courts consider it as raising a presumption, that they have an interest. And when the act of the covenantor asserts a title, in contradistinction to an act which is a

(*h*) Cro. Jac. 590.
(*i*) 1 Mod. 108. 2 Lev. 28. Pigot, 176.
(*k*) 4 Maule & S. 53.
(*l*) 1 Saund. 58. 1 Sid. 328. 2 Bos. & Pull. 23, 25., unless that effect is evidently intended.
(*m*) Nervin v. Muns, 3 Lev. 46.
(*n*) Vaugh. 122.
(*o*) Cro. Eliz. 212. Hob. 35.
(*p*) 1 Term. Rep. 671.

temporary violation of property (as sporting) (*q*), it would be unreasonable not to give an action on the covenant, notwithstanding the tortiousness of the claim, as none of the inconveniencies which would ensue the admission of the doctrine, as between the purchaser and third persons, can be apprehended; and in a great majority of instances the covenant itself would, as against the vendor himself, be a nullity, and indeed in every case, it is conceived, in which the conveyance works an estoppel. (*r*)

As therefore it is now settled, that this *general* covenant for quiet enjoyment extends only to a *lawful* interruption, it is no longer necessary to confine it to such by express words. For the same reason the word "*equitable*" may likewise be omitted; it being now clear that a suit in equity is within a covenant against disturbances generally. (*s*) The cases which have settled this point, may be considered not only to have overruled Lord Dyer's decision to the contrary (*t*); but to have subverted the principle of it; and, therefore, although in the case before his Lordship, the covenant was for enjoyment without *lawful* eviction, it is conceived the insertion of that word would not at present be allowed an *exclusive* energy.

I have selected the words *interruption* and *disturbance* as the most generic and simple: there can be no reasonable doubt of their sufficiency.

It was held in the case of Howel v. Richards (*u*), (and on solid grounds) that the effect of the qualifying language of the first covenant will not extend to the present, if the latter be expressly extended further. In that case great stress was laid on this covenant, being distinct from the covenant for title: hence it does not militate with the proposition in the Touchstone, that "if the lessor covenant with the lessee, that he has done no act to prejudice the lease, but that the lessee shall enjoy it against all persons," the latter words shall refer to, and be restrained by the first (*v*); for here there is only one covenant; its language forms one connected sentence, and the parts of it cannot be reconciled by any other construction. But it is difficult to reconcile, satisfactorily, Howel v. Richards with the latter case of Nind v. Marshall (*w*), which was similarly circumstanced, with the exception of the covenant for quiet enjoyment *alone* being extended generally to the acts of all mankind; the succeeding

(*q*) 13 East, 72.
(*r*) Sup. 8.
(*s*) 2 Mod. 54. Raymd. 370.
(*t*) Mo. 859. 1 Brown. 23. Winch. 116.
(*u*) 11 East, 633.
(*v*) Touch. 166.
(*w*) 1 Brod & Bing. 319.

covenants being limited like the first; whereas, in Howell v. Richards, the covenant against incumbrances was equally general (saving that it excepted a chief rent) with the preceding one for quiet enjoyment. The distinction seems somewhat thin; and the reasoning of the court in Howell v. Richards would, as I conceive, lead to the same conclusion in both cases. But in the present precedent, the qualifying language need not be repeated, as, in that respect, this covenant goes no further than the first. When the grantor does not take by purchase for a valuable consideration, the nature of the covenants requires us to add, "or through, under, or in trust for the said (ancestor) deceased," or (as the case may be) "any of his ancestors," or (if he takes by devise from the last purchaser) "the said (testator) deceased."

(47) It may be inferred from the case of Butler v. Swinnerton (*x*), that this covenant would be broken by the entry of a person in whose name the vendor had purchased jointly with his own; — if a tenant in tail be the covenantor, by the entry of his issue; — if one whose estate is subject to dower, by the entry of the dowress; — and in all other cases where the interruption proceeded from one whose title arose by means of the covenantor: — but that it would not be broken in those in which such person comes in by a title paramount to that of the covenantor, and not by his agency. Thus, when it is entered into, not by the original donee in tail, but by an intermediate issue, or by a tenant for life, it is not, in the one case, broken by an interruption from the issue in tail, — in the other, from the remainder-man. But the mere circumstance of the title of the claimant being paramount to that of the covenantor, is insufficient to take the case out of the covenant. Thus the title of an appointee, by way of use, when created, is coeval with that of the appointor, being derived, not from his estate, but the original seisin to uses; yet being raised by the instrumentality of the appointor, a disturbance by the appointee violates this covenant. (*y*)

It may be noticed, that as this covenant is for quiet enjoyment against all claiming from or under the vendor, a claim of dower by his mother would not, like a claim of dower by his wife, be within the covenant. (*z*)

(48) The word "*that*" is a pronoun, and used emphatically.

(49) It would puzzle the most ingenious invention to discover an adverse right which is not comprised immediately or inferentially

(*x*) Palm. 399. Cro. Jac. 657.
(*y*) Hurd v. Fletcher, Doug. 43.
(*z*) Godb. 333. Palm. 340.

in these words, which are therefore substituted for the multitudinous host in common use.

I will observe here, that I have generally omitted the words *whosoever* and *whatsoever*, from considering that they do not possess any expansive force. Where a testator devised all *his effects of what nature or kind* SOEVER; the natural meaning of the word *effects* was held to receive no expansion from the accompanying expressions, and to apply only to personalty. (*a*) If this be the case in a will, *à fortiori*, is it in a deed.

(50) The addition of the word *default* to the restrictive part of this covenant, materially extends the liability of the vendor; for when the covenant guarantees the purchaser from the acts, not merely of those who claim through the vendor, or by his positive agency, but of those who claim in consequence of his *default* or acts of omission, it may give a right of action on account of a title paramount. Hence that word has been construed to extend to an arrear of quit-rent, which accrued before the vendor became possessed of the estate (*b*); and to an eviction by a remainder-man where the covenantor was tenant in tail, and might have gained the fee by suffering a recovery. (*c*) The principle, however, of the case which determined the first point, really seems, as was concluded by the counsel in it, to be, 1st, tantamount to a decision, that the covenant, though limited, should extend to the acts of all the world; 2ndly, to apply to any incumbrance created by a prior owner; — and should it be thought a valid authority, and to lead to this conclusion, the word "default" should of course be omitted, as frustrating the intention of the parties. The case which decides the second point, has been, however, distinguished from the former, on the ground, as it should seem, of its containing *a recital of the grantor's being seised in fee*. (*d*) But the materiality of that circumstance I am at a loss to perceive, since the analogy between one who, having a particular interest only, assumes to be tenant in fee, and one who, having an incumbered fee, assumes to have an unincumbered fee, appears to me exact.

(51) This covenant is binding in equity on the assignees of vendor in the event of his bankruptcy, though only a tenant in tail. (*e*) This point is now settled; and though the earlier cases, Beck v. Welsh (*f*), and Taylor v. Wheeler (*g*), conflict in the

(*a*) Doe v. Dring, 2 M. & Sel. 448.
(*b*) Howes v. Brushfield, 3 East, 491.
(*c*) Lady Cavan v. Pulteney, 2 Ves. J. 544.
(*d*) Sug. Vend. 572. 7 Ed.
(*e*) Pye v. Daubuz, 3 Bro. C. C. 595.
(*f*) 1 Wils. 276.
(*g*) 2 Vern. 564.

principles they were judicially referred to, they may be distinguished, if in the former case we are to presume that, from there being no allusion to the covenant for further assurance, there was none, and if we admit the unquestionable importance of that circumstance.

(52) These words are not material, since they only express what the law otherwise implies; for the further assurance must be at the costs of the grantee, unless it is provided to the contrary. (*gg*)

(53) It seems that if, on a sale of the purchased lands, the purchaser is compelled to part with the original conveyance, he may, under this covenant, require the vendor to execute a duplicate of it. (*h*)

It is observable that a covenant to make such title as vendee's counsel shall approve, means no more than to make a good title. (*i*)

(54) It is necessary (as some have supposed) (*k*) that there should be an express stipulation for covenants in the further assurance, in order to compel the grantor to enter into them. It has, indeed, been decided, that a reasonable assurance involves reasonable covenants, though not warranty (*l*): but this distinction has in other cases been rejected. (*m*)

(55) We may conclude this part of a purchase conveyance, with a brief examination of an important quality in the covenants for titles, in reference to an idea which is entertained by some conveyancers; viz., that to run with the land they must be entered into with the grantee of the common-law estate. There seems, however, to be no authority expressly deciding, that if made by or with the cestuique use, or taker of the legal fee, they will be in gross; and the contrary was assumed in the case of Roach v. Wadham (*n*), without a doubt being thrown upon the point. For there the cestuique use, who was also donee of a power, having covenanted to pay a rent reserved by the vendors, made an instrument which the court determined to be an appointment; and that in consequence of that construction, the alienee was not bound by the covenant: whereas, had the court held the instrument to operate as a con-

(*gg*) See 1 Buls. 90.

(*h*) 1 Eq. Ca. Abr. 166. pl. 4. (*i*) 10 Mod. 505.

(*k*) 1 Barton's Preced. 155. 3 Ed.

(*l*) See Lassels v. Catterton, 1 Mo. 67. 1 Sid. 467., where Twisden, J. expressly draws this distincton; yet Mr. Barton relies on this very case in support of his observation.

(*m*) See Coles v. Kinder, Cro Jac. 571. See also 1 Russel's Rep. 259. n. (a), where the Vice-Chancellor is said to have doubted whether a purchaser who does not require a covenant for the production of title deeds at the time he takes his conveyance, can, under the covenant for further assurance, require it afterwards. This case is not yet reported. (*n*) 6 East, 289.

veyance, which, in order to preserve the liability of the alienee to the covenant, it was unsuccessfully insisted to be, he would have been considered subject to the action. The very raising of the question in Roach v. Wadham, whether the instrument enured as an appointment or conveyance, would have been nugatory, if the action on the covenant, brought by the original vendor against the appointee, had been maintainable on the latter assumption. So, too, if the idea adverted to were well founded, general covenants for title entered into with a bargainee or covenantee would be in gross. But it may be readily admitted, on the other hand, that if the covenants are made by or with the grantee to uses, they may run with the land; for when the possession is transferred to the use, the covenants, which are ancillary appendages to the possession, are carried with it. And since the case of Roach v. Wadham, which decides, as we have already seen, that an appointee of a covenantor is not bound by the covenant by reason of his not taking the estate to which the covenant is annexed, the covenants for title *ought* to be entered into with the grantee to uses. For when they are entered into with the cestuique use, who is not as in the present precedent also grantee of the common-law estate, and he aliens by appointment, they do not run with the land. But when they are entered into with the grantee to uses, it necessarily follows, that as the first or immediate cestuique use has the benefit of them, his appointee must also take it; for being transferred to the use with the land, they must, like the estate in the land, follow the modifications of the use. It is somewhat surprising, that Mr. Sugden, who has viewed this subject in another light, does not perceive that this proposition is the obvious result of admitting the operation of the statute on covenants, as a subordinate annexation to the common-law estate. Yet though he has, in one part of his valuable treatise, mentioned the propriety of covenanting with the grantee to uses, he observes in another, that *wherever* a *purchaser* is to enter into a covenant which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower. (*o*) But if the conclusion above stated be justly drawn, that gentleman's observations ought to have been confined to those cases in which the covenants have been entered into by the *cestuique use.*

Another doctrine has been developed by a gentleman of great learning and experience. "When," he says, "a deed purports to

(*o*) Vend. 562. 7 Ed.

be a purchase deed, and operates as an appointment only in execution of a power, so as to pass the use without transferring the seisin, and covenants for the title are inserted in such deed, it is necessary to make the persons having the common-law seisin parties, in order to make the covenants run with the land." (*p*) This seems to be an acquiescence in Mr. Sugden's conclusion, with the superaddition of a remedy for the evil which he alleges the existence of: but how it can operate as such I know not. The estate of the grantee to uses is gone: it was *functus officio* at the moment of its creation; and if, according to ancient refinements, we say, that a *scintilla* remains for serving the future use, what authority is there for going further, and dilating that fictitious particle of seisin into an actual grantable estate? The covenants, it is conceded, are transferred together with the seisin of the covenantee to the first vested use; and the effect is evidently the same, whether the taker of that use be himself the grantee of the common-law estate or not. Now if (as in modern purchase deeds) he is the donee of a power, and executes it, his use is divested, and the covenants which were accessary to it, are divested likewise, and transferred to the appointee.

The practical conclusion deducible from this inquiry is, that if, in a purchase conveyance to uses, the covenants for title are entered into with the cestuique use alone, they will run with the land if he conveys, but not if he appoints (*q*); but that if they are entered into with the grantee to uses, they will run to the appointee likewise, by the mere operation of the appointment, whether such grantee be also the donee of the power (or cestuique use) or not.

(*p*) Phillips' Convey. 181.

(*q*) Roach v. Wadham, supra, 49.

PRECEDENT II.

TO USES, &C., WITH THE CONCURRENCE OF A MORTGAGEE IN FEE, A MORTGAGEE FOR YEARS, AN ANNUITANT, AND A TRUSTEE FOR SALE.

THIS INDENTURE, made, &c.,

I. Parties. between H. Haller, of, &c., of the first part, W. Williams, of, &c., of the second part, M. Miles, of, &c., of the third part, J. Jones, of, &c., of the fourth part, S. Soame, of, &c., of the fifth part, N. North, of, &c., of the sixth part, F. Phipps, of, &c., of the seventh part, and E. Eames, of, &c., of the eighth part (1): WHEREAS, by indentures of lease and release, bearing date respectively, on the and days of November, 1802, the release made between N. Nokes of the first part, the said Samuel Soame of the second part, and Daniel Doe of the third part, for the valuable considerations therein expressed, the hereditaments, hereinafter described, were conveyed to the said Samuel Soame and his heirs to such uses generally as he should appoint by any deed or deeds to be executed as therein mentioned (2), and subject thereto to the use of the said Samuel Soame for his life, with remainder to the use of the said Daniel Doe and his heirs during the life of the said Samuel Soame, in trust for him and his assigns, with re-

II. Recitals.

1. Last purchase deed.

mainder to the use of the said S. Soame and his heirs (3): AND WHEREAS, by an indenture bearing date on or about (4) the day of January, 1803, and expressed to be made between the said S. Soame of the one part, and the said W. Williams of the other part, the said S. Soame, for the considerations therein expressed, did demise to the said W. Williams (5) the said hereditaments, from the day next before the day of the date of the said indenture, for the term of 1000 years thence ensuing, without impeachment of waste; but subject to a proviso for cesser on payment by the said S. Soame to the said W. Williams of the sum of *l.* with lawful interest for the same on the day of thence next ensuing (6): AND WHEREAS, by indentures of lease and release bearing date respectively on the and days of April, 1804, and made between the said S. Soame of the one part, and F. Fairfield of the other part, for the considerations therein mentioned, the said S. Soame did appoint and also release* to the said F. Fairfield and his heirs, the said hereditaments, but subject to a proviso for redemption, on payment by the said S. Soame to the said F. Fairfield of the sum of *l.* with lawful interest for the same on the

2. Mortgage by demise.

3. Mortgage in fee

* In a future precedent will be shewn a novel, but more accurate mode of reciting an appointment and release.

4. Transfer of the mortgage.

day of thence next ensuing (7): AND WHEREAS, by indentures of lease and release, bearing date respectively on the and days of June, 1805, the release made between the said F. Fairfield of the firs t part, the said S. Soame (8) of the second part, and the said H. Haller of the third part, for the considerations therein mentioned, the said hereditaments were conveyed to the said H. Haller and his heirs, discharged from all former provisoes, but subject to a proviso for redemption thereof, on payment by the said S. Soame to the said H. Haller of the sum of *l.* with lawful interest for the same on the day

5. Further charge.

of thence next ensuing: AND WHEREAS, by indenture bearing date on the day of July, 1806, and made between the said S. Soame of the one part, and the said W. Williams of the other part, for the considerations therein mentioned, the said S. Soame did further charge the same premises to the said W. Williams with the sum of *l.* and lawful interest for the same,

6. Grant of a rent-charge.

as therein mentioned: AND WHEREAS, by an indenture bearing date on the day of August, 1807, and made between the said S Soame of the ~~one~~ 1st part, and the said J. Jones of the ~~other~~ 2d and Stokely Hurstead part, for the considerations therein mentioned, the said S. Soame did grant to the said J. Jones out of the

said hereditaments, a rent-charge of *l.* for the term therein mentioned (9), and did demise to A. Aker the said hereditaments from the day next before the day of the date of the same indenture for the term of

Term to secure it.

500 years thence ensuing, in trust to secure the said rent-charge, but with a power enabling the said S. Soame to repurchase the same at the time and in the manner therein mentioned, on payment to the said J. Jones of the sum of *l.* and all arrears of the said rent-charge, and all costs thereof, and with a proviso for ceasing the said term on such event (10): AND WHEREAS, by indentures of lease and release, bearing date respectively on the and days of September, 1808, and made between the said S. Soame of the one part, and the said M. Miles of the other part, for the considerations therein mentioned, the said S. Soame did convey to the said M. Miles and his heirs, the said hereditaments in trust for sale as therein mentioned, to secure the principal sum of *l.* with lawful interest to the said M. Miles, and subject thereto in trust for the said S. Soame: AND WHEREAS the said principal sum of *l.* and the further sum of *l.* together with the sum of *l.* for an arrear of interest in respect of the same sums, making the aggregate sum of *l.* remain due to the said W.

7. Conveyance in trust for sale.

8. Mortgage money due.

Williams on his said recited securities, as the said S. Soame and W. Williams respectively

9. Ibid. admit (11): AND WHEREAS the said sum of *l.* remains due to the said H. Haller, with the sum of *l.* as an arrear of interest in respect of the same up to the date hereof, making the aggregate sum of *l.* as they the said S. Soame and H. Haller re-

10. Annuity still payable. spectively admit: AND WHEREAS the said rent-charge of *l.* is still payable to the said J. Jones, but all arrears thereof have been paid up to the day of the date of these presents, and he hath agreed to accept the sum of *l.* as the consideration for the

11. Mortgage money due. repurchase thereof: AND WHEREAS the said sum of *l.* remains due to the said M. Miles, with the sum of *l.* for an arrear of interest in respect thereof, up to the date of these presents, making the aggregate sum of *l.* as the said S. Soame and M. Miles hereby respectively admit.

12. Contract. *Contract for sale between S. Soame and N. North,* vid. sup. 18.

13. Agreement with the mortgagees. AND WHEREAS it hath been agreed that the said several sums so due as aforesaid, shall be paid out of the said purchase-money, in consideration whereof the said H. Haller, J. Jones, and M. Miles, have agreed to concur in assuring the said hereditaments to the said N. North, in the manner hereinafter appearing, and the said W. Williams hath agreed to

assign the said term of 1000 years to the said E. Eames in trust, to attend the inheritance of the said premises: NOW, THEREFORE, THIS INDENTURE WITNESSETH that in pursuance of the said recited agreement, and in consideration of the sum of £ , of sterling money, to the said W. Williams, with the consent of the said H. Haller, J. Jones, M. Miles, and S. Soame, paid by the said N. North, immediately before the execution of these presents, in satisfaction of all principal money and interest, owing to the said W. Williams, on his aforesaid securities, the receipt of which said sum of £ accordingly the said W. Williams doth hereby acknowledge, and from the same doth release the said N. North, and S. Soame (12), and also in consideration of the said sum of £ , of sterling money to the said H. Haller, with the consent of the said J. Jones, M. Miles, and S. Soame, at the time aforesaid, paid by the said N. North, in satisfaction of all principal money and interest owing to him on his aforesaid security, the receipt of which said sum of £ accordingly the said H. Haller doth hereby acknowledge, and from the same doth release the said N. North and S. Soame, and also in consideration of the sum of £ , of sterling money to the said J. Jones, at the time aforesaid, paid by the said N. North, with the consent of the said M. Miles and S. Soame,

III. Testatum.

Payment of the first mortgage-money.

Of the second.

Repurchase of the annuity.

in satisfaction of all arrears of annuity due to him on his recited security, the receipt of which said sum of £ , the said J. Jones doth hereby acknowledge, and from the same doth release the said N. North and S. Soame,

Payment of the last mortgage-money.

and also in consideration of the said sum of £ of sterling money to the said M. Miles, with the consent of the said S. Soame, at the time aforesaid, paid by the said N. North, in satisfaction of all principal money and interest owing to him on his aforesaid security, the receipt of which said sum of £ accordingly the said M. Miles doth hereby acknowledge, and from the same doth release

Of the residue of the purchase money.

the said N. North and S. Soame; and also in consideration of the sum of £ , of sterling money, to the said S. Soame at the time aforesaid, paid by the said N. North, the receipt whereof, as well as the payment of the said several sums of £ , £ , £ , and £ , making with the sum of £ , the aggregate sum of £ , the said S. Soame doth hereby acknowledge and declare the same to be the full purchase money of the said hereditaments, and the fee-simple thereof, free from all incumbrances, except as hereinafter mentioned, and from the same aggregate sum doth hereby release the said N. North; he the said H. Haller, with the consent of the said J. Jones and M. Miles, and by the direction of the

IV. Operative part.

said S. Soame, by these presents DOTH RE-

LEASE (13), and he the said J. Jones, from the said yearly rent-charge of £ , by the like direction of the said S. Soame, by these presents DOTH ALSO RELEASE (14), and he the said M. Miles, by the like direction of the said S. Soame, by these presents DOTH ALSO RELEASE, and he the said S. Soame, by these presents DOTH GRANT, RELEASE, AND CONV. Bargain and sale. FIRM, to the said N. North (in his legal ownership, now being by a bargain and sale to him thereof made by the said H. Haller, M. Miles and S. Soame (15), in consideration of five shillings each, &c., [*sup.* 18.]) and his heirs, all that the manor, &c., [*describe the parcels.*]

Parcels.

VI. General words for manors. Together with all rights, royalties, emoluments, hereditaments, and appurtenances whatsoever, to the manor or reputed manor, and other hereditaments hereby assured, in any wise appertaining, or with the same or any of them demised, occupied, or reputed, as parcel of them, or any part of them.

Deeds. [*Deeds, sup.* 19.]

VII. Habendum. TO HAVE AND TO HOLD the said "manor, messuages, lands, and" hereditaments, hereinbefore described, with their rights, royalties, members, and appurtenances, unto the said

VIII. Uses. N. North and his heirs, nevertheless, to the uses hereinafter declared concerning the same. [*Uses to bar dower, sup.* 19.]

IX. Several covenants by the mortgagees.

AND each of them, the said H. Haller and M. Miles, as concerning only his own separate acts and defaults, doth hereby for himself and his heirs, covenant with the said N. North, his appointees, heirs, and assigns, that he hath not made, done, or suffered, any thing whereby the said hereditaments hereby released, or any part thereof, can be in any wise incumbered or affected (16): AND the said J. Jones doth hereby for himself and his heirs, covenant with the said N. North, his appointees, heirs, and assigns, that he hath not made, done, or suffered, any thing whereby the same hereditaments or any part thereof, can remain in any manner subject to the said yearly rent-charge of £ , or any arrears thereof, "or any liability in respect thereof;"

X. By the grantee of the rent-charge.

XI. Covenants for the title.

[*covenants for the title by S. Soame* (17), *with N. North*, 1st, that notwithstanding any thing made, done, or suffered, by W. Williams, H. Haller, J. Jones, M. Miles, or S. Soame (except as hereinafter excepted), they the said H. Haller, M. Miles, or S. Soame, or one of them, now have or hath in themselves or himself, good right, &c., *vid. sup.* 20, 21.]

XII. Second testatum.

AND THIS INDENTURE LASTLY WITNESSETH, that in consideration of the said sum of £ , hereinbefore expressed to be paid to him, he, the said W. Williams, by the direction of the said H. Haller, J. Jones, M. Miles, and S. Soame, and at the request of the said N.

XIII. Operative part. North, by these presents DOTH ASSIGN (18) to the said Edward Eames all the said hereditaments with the appurtenances, which were comprised in the said term of 1000 years, "created by the hereinbefore recited indenture of the day of January, 1803," and which are hereinbefore described: TO HAVE AND

XIV. Habendum. TO HOLD the same hereditaments hereby assigned, with their appurtenances, to the said Edward Eames, henceforth during the residue of the said term of 1000 years, in trust, nevertheless, "for the said N. North, his appointees, heirs, and assigns, and" to attend the inheritance of the same hereditaments, in

XV. Covenant by mortgagee. order to protect it from all mesne incumbrances (19): AND the said W. Williams, for himself and his heirs, doth hereby covenant with the said N. North, his appointees, heirs, and assigns, that he hath not made, done, or suffered, any thing whereby the hereditaments hereby released and assigned, or any part thereof, can be in any wise incumbered or affected. In witness, &c.

(1) The general principle is, that the parties are to stand in the order in which they are to act in the deed. From this principle the following specific rules, which have been observed in this precedent (*a*), may be drawn. — Place,

1. The grantors before the grantees.

(*a*) Haller and Williams (supposing the latter to have perfected the demise by an entry) have both legal estates; the former has the legal reversion in fee. Haller therefore takes precedence of Williams, and Williams of Miles, though the interest of the last is of a freehold quality.

2. Persons having legal estates according to their priority.

3. Persons having legal estates, before those who have only equitable interests.

4. Those who have freehold estates, before those who have terms of years.

5. Vendors, after all whose estates they take subject to.

6. Those having estates in part of the land, after those having estates in the whole property.

7. The purchaser before his trustees.

8. Such of his trustees as take freehold estates, before those who take only terms of years.

9. The term trustees, according to the priority of the terms.

To these may be added the following rules, to meet particular cases.

1. A person standing in two or more capacities, should be introduced in them at distinct parts.

2. Where several classes of persons convey, one class should be disposed of before the others are described.

3. A person conveying at the request, or by the direction of another, should stand before him.

4. Joint-tenants and co-parceners (having an unity of interest) should form but one party; tenants in common (*a*), or others having distinct interests, separate parties.

(2) The mode in which the power was required to be executed, is not implicated in the title of the purchaser, and to set it forth would, therefore, be an inartificial superfluity. The present case is, of course, different from that in which the purchaser takes under the appointment of the vendor.

(3) In this conveyance the last purchase deed is recited, and then the subsequent transactions in chronological order; the manner in which deeds should in general be recited. But, we may observe, when there are several distinct titles or chains of transactions, it is better to sacrifice this order for the sake of preserving their distinctness, and to complete one chain before the other commences.

In this recital of a lease and release to uses, as in the previous recital (Prec. 1. I. 1.) of a lease and release in fee, the effect only is given. There are few occasions for commencing a purchase conveyance with a more formal recital, showing who the persons were that conveyed to the grantor. Such a recital is only proper when it is expedient to go back to the antecedent conveyance; when the title is not demonstrated without showing that the lands became vested in the last vendor, by a grant from competent persons.

(*a*) But tenants in common may sometimes, without impropriety, form only one party.

The expression in this recital, that the lands were *conveyed* to the last vendor to the uses, &c., is preferable to that which is sometimes used, viz., that the lands were *limited* to *him* to those uses; for, as in the language of conveyancers, the word *limit* has peculiar reference to the uses, it may be correctly said, that the lands have been limited to such and such uses, but it is inaccurately applied to the common law estate.

(4) These cautious words are proper whenever a reference is made (as in the present instance, by the subseqnent assignment), to the indenture in recital, so as to create a dependency upon it in the operative part.

(5) In the creation of chattel interests, words of limitation to the personal representatives and assigns of the grantee being useless, we may omit them in reciting a lease which contains them.

(6) As it is *subsequently* stated that the money is still due, it is unnecessary to say here, as many do, that it " was not paid at the time mentioned in the proviso, whereby the term became absolute."

(7) For the reasons above adverted to, if there be a power of sale annexed to this, to the preceding, or following mortgage, it need not be mentioned; not being acted on, and being, indeed, precluded by the present transaction, it is irrelevant to the purchaser's title, which is derived from the mortgagor, with the mortgagee's concurrence, and, therefore, paramount to the power.

(8) It is always expedient to make the mortgagor concur in the transfer of a mortgage. (*b*)

(9) It is irrelevant to consider in this recital, the rent-charge as a personal annuity, which so far as it charges the grantor personally on his covenant, it also is. (*c*) Hence it is only proper to state the grant of the rent out of the purchased hereditaments, and the term created in the trustee to secure it; because it is this grant and demise — not the grantor's covenant to pay the annuity — which are connected with the purchaser's title. These remarks, though sufficiently obvious, are frequently neglected. The demise of the term is to a third person; for if to the grantee of the rent, it would extinguish it. (*d*)

(10) It is proper to state this; for without this proviso of cesser, A. Aker would become, on the repurchase of the annuity, a trustee for S. Soame, and the term should be either assigned or surrendered.

(*b*) 2 Cruise's Dig. 108. 3d. Ed.

(*c*) As to the two remedies by distress and writ of annuity, attendant on every grant of a rent-charge, see Litt. s. 219. Co. Litt. 145. a.

(*d*) See Co. Litt. 148. a.

(11) It is usual to say here, " testified by their execution hereof." But this is one of those statements which I omit, because they are productive of no effect, being involved in the silent operation of law. Nay, it is rendered idle, by the concluding clause. Why apply particular testifications to certain parts of a deed, when it ends with its emphatic declaration, " in witness whereof," (that is, of the whole deed, *reddendo singula singulis*), " all the parties hereto have to these presents set their hands and seals ?"

It may be observed, that these, and the following recitals to the same effect, are commonly termed *consequential*, because they follow the recital of the mortgage.

(12) Vid. sup. n. (15.) p. 29.

(13) The conveyance of Haller passes the legal fee. For the reasons given, and on the authorities cited in a preceding note (*e*), there is no utility in using any other operative word than " *release*," in the grant by him.

(14) This release operates by way of extinguishment. When the rent-charge issues out of the purchased premises and other lands, and the former only are intended to be discharged, this mode should not be adopted, as on principles of feudal origin, by which rent-charges are construed strictly (*f*), a release of part of the lands out of which it issues, is an extinguishment of the rent. (*g*)

(15) The bargain and sale must be made by the person having the legal estate; and when, as in the present case, *that* is vested in a trustee or mortgagee, the material point is, that he is one of the lessors. If the cestuique trust alone were to attempt to demise, no legal estate would be given to the lessee, and the release therefore would, as such, be void. The object of joining the cestuique trusts in the bargain and sale, is to show that the trustee demises by their direction; but this is never necessary, and where the parties to the release are numerous, and brevity is desirable, the person having the legal estate of freehold (in this instance H. Haller) may be the sole granting party in this instrument.

We have seen that a remainder or reversion is transferable by lease and release. If, therefore, an immediate right to the possession be in a termor (as in this case it is in W. Williams), no impediment is thereby raised to the operation of a bargain and sale, by the person having the freehold expectant thereon; and it would be quite incorrect to make the former bargain and sell, as no interest could be derived from him by the statute of uses.

(*e*) Sup. (16.) p. 29.
(*f*) Gilb. Rents, 152.
(*g*) 1 Inst. 147. b.

(16) Mortgagees and trustees, as such, are never obliged to enter into a more extensive covenant than this.

(17) These covenants the reader observes, are entered into by S. Soame the vendor, who has no legal interest in the lands, a circumstance which calls for some examination. It has been held, that for the covenants to run with the land, there must be a privity of estate between the covenanting parties (*h*); but this principle is not regarded in ordinary practice; and the conclusion flowing from it, that the covenantor must have the legal estate at the time of the conveyance, is not acceded to by many gentlemen of eminence. If this result of the requisition of privity were tenable, it would, as Mr. Sugden has observed, be "truly alarming (*i*)," as in a great majority of instances, the legal fee is outstanding when the conveyance is made. But the writer is inclined to think that if a mortgagor or cestuique trust contract to sell the absolute inheritance, the consequence Mr. Sugden mentions, that the purchaser can call for a previous reconveyance to the vendor, does not necessarily follow. Surely, if the purchaser be apprised of the legal estate being outstanding, and the vendor does not expressly agree to take a reconveyance of it to himself, there would be no ground for such a requisition. Nothing exists at present, that the writer is aware of, from which it can be inferred that the courts of equity would admit it, even if the purchaser, when he entered into the contract, was not aware that the legal estate was outstanding. If, however, the purchaser offer to defray the expence of the reconveyance, it might be otherwise; for of course it would then be extremely unreasonable in the vendor to refuse a compliance with the demand. But the inference which has been commented on, is pretty generally rejected; and the prevailing opinion seems to be, that if the legal estate is transferred by the conveyance, the circumstance of the covenantor being only equitable owner is immaterial. This idea, even if erroneous, would probably have considerable influence with the courts; for though the prevalence of a misconception is no argument for its adoption, when it is (to use an expression of Lord Ellenborough), "a loose and theoretical floating in the minds of men," yet *communis error facit jus*, when it has been made the groundwork and substratum of practice. (*k*)

(18) In transactions in which a slight increase of expence is unimportant, the term should be assigned by a different deed, and no

(*h*) 3 T. Rep. 393—678. 1 H. Bl. 562.
(*i*) Vend. 563. 7th Ed.
(*k*) 3 Maule & Sel. 396.

allusion made to it in the conveyance of the fee. By that means it operates as a protection, without being in any way productive of inconvenience; for as the evidence of the term is in the power of the purchaser, he may then exercise the privileges of legal ownership, as freely as if no term were in existence.

(19) The doctrine of terms, attendant on the inheritance, has of late excited peculiar attention, and been gone into with a minuteness proportioned to its importance. The writer will endeavour, in a brief survey of the learning, to display its true foundations. It should be premised, and always borne in mind, that the attendancy of a term on the inheritance is a result purely equitable; for it is the effect of a merger of the equitable interest of the term with the inheritance, in consequence of their coalescing in the same person. (*l*) But for the equitable interest only of the term to be merged, it follows that the legal estate therein must continue to exist, and must, therefore, in order for the term to be attendant, be vested in a third person, and not in the legal owner of the inheritance. It is likewise a deduction from the principle which has been advanced, that when there is *no* equitable merger, the term is *not* attendant. Now there can be no merger of one estate in another, when an estate is interposed between them,—at law, if the intervening interest be a legal estate;—in equity, if it be an equitable interest. Suppose, upon the sale of lands, a term of years to be outstanding in trustees for the vendor, and instead of its being *assigned* to a trustee for the purchaser, it is conveyed by underlease, so that a portion of the legal estate remains in the original trustee. According to the above doctrine, the term in the trustee for the purchaser is clearly attendant, because, notwithstanding the reservation of a reversion to the original trustee, the equitable merger is complete; for the transfer of the inheritance carried with it, as its natural appendage, the trust of the term, which was annexed to it; so that a legal reversion in the original trustee made no division of equitable rights. But if there be an intervening *beneficial* interest between the trust of the term and the inheritance, the conclusion to which this reasoning leads us is, that the term cannot, in the nature of things, be attendant on the inheritance. Of this opinion, too, was Mr. Fearne (*m*), and, it is conceived, there cannot be a doubt of the legitimacy of the inference. Mr. Sugden (*n*), however, has thought that Mr. Fearne's opinion goes too far, and that gentleman acquiesces in the distinction which is established by the case of Scot v. Fenhoullet. (*o*) But to the writer,

(*l*) Capel v. Girdler, 9 Ves. 509.
(*n*) Vend. 459, 7th Ed.
(*m*) 2 Collect. Jurid. 297. no. 6.
(*o*) 1 Bro. c. c. 6—9.

that distinction, even as explained in Mr. Sugden's valuable treatise, seems an anomaly; and it must be viewed in the same light by all who concede the proposition we have set out with, as the fundamental principle of the doctrine of attendancy. Irregular, however, as the judgment of Lord Thurlow in Scot v. Fenhoullet, is apprehended to be, and weakened as its authority is by the discrepancies discoverable in it, the profession have very generally acceded to the proposition decided by it; that when there is an intervening beneficial interest between the term and the inheritance, the former cannot become attendant by implication of law, but *may*, nevertheless, by *express declaration*.

If we follow up the principle above laid down, another consequence necessarily arrived at is, that the inheritance on which the term is attendant, descends to the heir, and is real assets. (*p*) For the trust of the term being consolidated with and drowned in the freehold, it is therefore not an *equitable chattel* which devolves on the heir, but *the freehold itself*, and a present interest. A conclusion which equally holds, whether the term be attendant by express declaration, or by implication. This observation may shew the inaccuracy of speaking of the *term* as *real assets*. If, however, the beneficial owner take an assignment of the term in his own name, and have the inheritance conveyed to a trustee, the term is personal assets; for it is liable at law (*q*, and equity cannot prevent its liability.

The same principle (the merger of the equitable interest of the term) explains the necessity of devising the beneficial interest in the lands by a will accompanied with the solemnities appropriate to realty: it explains, also, the capacity of the term for the same modifications as the inheritance itself. (*r*) On the assumption, indeed, of a consolidation of the two estates, the loss and extinguishment of the lesser in the greater, it is inconsistent to treat the term as a continuing interest, possessed of peculiar properties. But this idea is lost sight of by those who conceive that when a term attends the inheritance merely by operation of law, the owner may *expressly* bequeath it by a will not executed with the solemnities required by the statute. (*s*) For in whatever mode, under whatever circumstances, the term attends the inheritance, the legal termor is a trustee for the owner of the inheritance; consequently, the equitable estate of the term is in the latter; and there being

(*p*) Baden v. Pembroke, 2 Vern. 52—213.
(*q*) 1 Vern. 188. Hard. 48
(*r*) 2 Cha. Ca. 49—55. Gilb. Eq. Rep. 168.
(*s*) 9 Mod. 127. 2 Collect. Jurid. 276.

(*ex hypothesi*) no barrier between that estate and the freehold, and both of them being in the same individual, there must be a perfect merger of the equitable term. And is it not an anomaly, and repugnant at least to all *legal* reasoning, to admit of the revival of an interest which has been extinguished by merger? It need not be said, that the resuscitation of an equitable term, which, at the time of its meeting with a larger interest in the same person, there is nothing to prevent from utter extinction, is altogether different from that qualified merger which there sometimes is of legal estates; as in a limitation to A. for life, remainder to his children (unborn) for life or in tail, remainder to the heir or heirs of the body of A., the freehold of A. is executed *sub modo*, or merged in the ultimate limitation of the inheritance, with a quality of opening to admit the intervening interests when they vest. (*t*) For in this case there is, at the time of the merger of those interests, a prospect of their arising; and, consequently, it is but rational to permit the junction of the estates between which they interpose to be temporary or conditional, and not so inextricable as to exclude and nullify the intermediate limitations in their very creation. But to the principal case, it is manifest this reasoning does not apply. And when the testator intends to pass the *inheritance*, but the will is not clothed with the solemnities required by the statute of frauds, it is clear that the equitable interest of the term is not given, and the lands descend to the heir. (*u*) It is, however, felt, that the conclusion commented on, — viz., that a term attendant merely by operation of law is expressly bequeathable by a will which would carry personalty, is fortified by, if not naturally deducible from, the *pre-established* doctrine, that such an attendancy may be rebutted even by a parol declaration of the person in whose favour it is made. (*v*) But against the *principle* of *that* doctrine, the same argument may be used. If the attendancy of the term result from the termor's being a trustee for the owner of the inheritance, without any obstacle to a merger of the equitable interest; — if, at the moment when the relation of trustee and cestuique trust commences, the two incompatible estates co-exist in the same person, and one of them is by consequence immediately annihilated; — it is difficult to see *how* (*w*) a declaration of the beneficial owner, not extending

(*t*) 11 Rep. 80. (*u*) Sug. 67. (*v*) Sugd. Vend. 459. 7 Ed.

(*w*) Except, perhaps, by regarding a term assigned to attend as (to use an expression of Lord Hardwicke's, Ambler. 284.) "a *creature* of the courts of equity," whence it may follow that it is governed by no principles but such as those courts think fit to establish. In the same case, Willoughby v. Willoughby, ibid. 284., Lord Hardwicke said, "The owner may separate the term [from the inheritance] if he thinks proper."

to a repudiation of the trust of the term, can obviate that attendancy which the writer regards as its inseparable concomitant. The courts, however, seem to give validity to such a declaration; and *thence* it may consistently follow that the beneficial owner may *expressly* devise the *term*.

Let us proceed, secondly, to consider the *utility* of the doctrine of attendant terms, and the principles on which the practice of the profession with regard to them is founded. The term in the trustee, it has been already said, is the legal estate. This, alone, therefore, is recognised by the courts of law. Hence the expression that every term is at law a term *in gross*. (*x*) Now it is a maxim in the courts of equity, that when there are various claimants with equal equity, he who has the legal estate shall be preferred. (*y*) For when an equitable owner has the legal estate, his title is complete; and as he no longer requires the assistance of the courts of equity, and they, consequently, remain passive, it is evident that the other claimants must be either excluded or postponed. But if he acquires the legal estate without such an equality of equity, then the courts of equity deem themselves no longer bound to continue neuter; and obviate the advantages resulting from that step, by making the person obtaining it a trustee for those who have an antecedent superior claim. This doctrine is capable of an easy illustration. Suppose the owner of the fee to have sold or mortgaged to various persons, none of whom had any knowledge, at the time of advancing their respective loans or purchase monies, of the prior sales or incumbrances. In this case their equities are equal; but from the courts of equity following the maxim of law *qui prior est tempore potior est jure*, the several claimants are paid according to their priority. (*z*) But let us suppose further, that at the time the first sale or mortgage was made, a term was outstanding. That circumstance, by taking from the first purchaser or mortgagee his legal estate, reduces him to a level with the subsequent incumbrancers, and leaves him only the advantage of priority. Then if either of the subsequent purchasers or mortgagees procure an assignment of the term to a trustee for himself, he immediately acquires precedency. But if such purchaser or mortgagee had *notice*, at or before the completion of his transaction, of any prior sales or incumbrances, his equity is no longer equal to that of the ante-

(*x*) 1 Term Rep. 765.
(*y*) Francis, Maxim 14. Fonblanque's Treatise on Equity, 321.
(*z*) 1 Bro. P. C. 66.

cedent claimants; and he is not allowed, therefore, to shield himself under the legal estate. (*a*)

Hence, when a person is a *bonâ fide* purchaser, and is on good grounds assured that no notice of any prior incumbrances can be proved upon him (*b*), and he can substantiate the title of the term, then unless it is of recent creation, it is even advisable to wave all search for incumbrances, and to rely on its protection. And when we consider the infinity of incumbrances to which realty is liable, the immense advantage of taking an assignment of outstanding terms is instantly apparent. Crown debts by specialty (*c*) are, indeed, the only species of incumbrances which follow the equitable as well as legal estate into the possession of a purchaser under all circumstances, and against which, therefore, a term in his trustee is unavailing. (*d*) As to the dower of the vendor's wife, it is now held, that an outstanding term created *bonâ fide* previously to the accruer of the right of dower, and actually assigned to a trustee for the purchaser, is a bar to it in equity, *notwithstanding notice.* (*e*) Yet by reason of the continuing liability of the lands at law to the claim of dower, it was usual, till the late decision of the Chancellor, in Mole v. Smith (*f*), to require a fine. But although in respect to other incumbrances, a term may be sometimes depended on, it is rarely safe to omit the investigations that would otherwise have been made; for constructive notice is of course equally binding on the purchaser with actual notice; and as it is of a vague uncertain nature, a purchaser can seldom be certain that it cannot be proved upon him. To give even an outline of the doctrine of notice would carry the writer far beyond the proposed limits of this note; but as the efficiency of the assigned term depends on the nonexistence of it, when the purchase is for a valuable consideration, he will briefly observe, that flying reports from strangers (*g*), a private act of par-

(*a*) 2 Vern. 29. 81. 2 Atk. 52. 347.

(*b*) It has, however, never been *decided* that if notice *can* be proved on the purchaser of an equitable interest, who takes a conveyance of the legal estate outstanding in a trustee, he will be liable to the judgments in equity. Mr Powell (2 Mort. 608. 4 Ed.) contends that he will not, because the lands are not liable *at law*, and equity follows the law.

(*c*) Aliter of simple contract debts, 1 Wight. 34.

(*d*) King v. Smith, Sugd. Vend. 445. 7 Ed.

(*e*) Maundrell v. Maundrell, 10 Ves. J. 246. ibid 259.

(*f*) 1 Jac. 490. This important decision of the Chancellor establishes not merely that the wife's right to dower is barred so completely that the purchaser cannot require a fine, but that if she herself be the termor she is compellable to assign. In this case the term vested in her as administratrix.

(*g*) Goulds. 147. Pl. 67.

liament (*h*), decrees of the courts of equity (*i*), the docketing of judgments (*k*), the registration of deeds (*l*), an act (*m*) or commission (*n*) of bankruptcy (unless the purchaser claims the benefit of Romilly's act (*o*), which makes a commission issued, though afterwards superseded, or a docket struck, constructive notice); the mere knowledge of a term's being assigned to attend the inheritance (*p*), the witnessing of a deed (*q*), do not operate as notice. But public acts of parliament, *lis pendens* (*r*) under certain modifications (*s*), reference, in an instrument which is essential to the making out of the title of the purchaser, to another fact or instrument (*t*), or sufficient information to put him on his inquiry (*u*), as knowledge of the legal estate (*v*), or the possession of the title deeds (*w*), or of the land itself (*x*), being in a third person; — any of these things *are* notice.

It remains to speak of the doctrine of presumptions with reference to the surrender of terms (*xx*);—a department of the learning into which much uncertainty has been unhappily infused, in consequence of the courts of law having bottomed some late decisions on principles which are not, perhaps, a legitimate foundation of legal adjudication.

The cases referrible to this learning are capable of classification;— 1. Those in which an actual surrender *has* been made, but only

(*h*) 2 Ves. 480.
(*i*) Toth. 45.
(*k*) 2 Cha. Ca. 47.
(*l*) *Aliter*, if the purchaser search the register, 1 Sch. and Lef. 103.
(*m*) 2 Vern. 599.
(*n*) 7 East, 161.
(*o*) 46 G. 3. c. 135.
(*p*) Sugd. Vend. 748. 7 Ed.
(*q*) 1 P. Wms. 393.
(*r*) Toth. 45.
(*s*) As unless it be collusive, 2 Cha. Ca. 116. or not close and continued. 1 Vern. 286.
(*t*) 1 Cha. Ca. 287.
(*u*) 1 Atk. 489.
(*v*) 2 Freem. 137. Pl. 171.
(*w*) 13 Ves. J. 114.
(*x*) 1 Mer. 282.

(*xx*) The authorities make no difference between terms of years and the inheritance with respect to this doctrine: and when, therefore, the former may be presumed surrendered, the latter may be presumed reconveyed. See England v. Slade, and Doe v. Sybourne, cited *infra*, in which the fee was outstanding, and presumed to be reconveyed. The case of Hillary v. Waller, 12 Ves. 239. has, however, led some writers into the gross mistake of supposing, that the legal inheritance depends on totally different principles. Thus in 1 Madd. Chan. 511. it is observed, that "the conveyance of a legal estate [read *of inheritance*], has, even in equity, been presumed after a great lapse of time, 140 years for instance." And even this decision has been disapproved (See Sugd. Vend. 309. 6 Ed.); but that was because the presumption was raised on a bill filed by a vendor for a specific performance of a contract, to which the doctrine of presumptions had never been applied before.

collateral evidence of it is producible from which a jury can infer the fact; — 2. Those in which *no* actual surrender has been made, but the law will presume the fact from the lapse of time and the dormancy of the term, and there is no positive circumstance to influence the presumption either the one way or the other; —3. Those in which the presumption is obstructed by a positive circumstance, as a trust of attendancy, which is not overcome by positive facts of an opposite nature, restoring the presumption.

With the first class we have at present no concern.

With the second, the general rule is, that after a dormancy of 20 years, an outstanding term, however created, whether by mortgage for years, by will, or settlement, is, by analogy to the period fixed by the statute of limitations, to be presumed surrendered. (*y*) And an express proviso that a term in trustees shall be surrendered, when the design of its creation is accomplished, seems to fortify the presumption, and accelerate the supposed surrender. (*z*) There are, indeed, cases in which this principle has been lost sight of. In Doe v. Scot (*a*), Lord Ellenborough treats the doctrine as flexible, and dependant on the *purposes of justice* to be answered by presuming a surrender; — an idea adopted in some later cases. But a tide of evils would succeed a breach upon the simple rule which has been laid down, and which is recognised by Sir James Mansfield in Doe v. Calvert (*b*), the greatest insecurity to purchasers, and the ridiculous incongruity of a term's being to-day the legal estate in the land, to-morrow a nonentity; — continuing, extinguished, resuscitated, according to arbitrary undefinable notions of justice, which are to vary with the ever-varying forms of particular cases. (*c*)

With respect to the third class, it is consonant to first principles,

(*y*) See Doe v. Calvert, 5 Taunt. 171., where Sir J. Mansfield said he had never known a case in which a shorter time than 20 years had been held sufficient. Sed vid. next note.

(*z*) When trustees are directed to convey to a devisee on his attaining 21, it has been held, that the jury may presume a conveyance at any time afterwards, though considerably less than 20 years. England v. Slade, 4 T. R. 682. The principle of that case obviously applies to the proposition in the text. It is singular that in Doe v. Sybourn, 7 T. Rep. 2., the identical point on the same will was raised and determined in the same way without any allusion to the previous decision, though it occurred only four years before.

(*a*) 11 East, 478. (*b*) Sup.

(*c*) If (said the Lord Chancellor, in the late case of Mole v. Smith, 1 Jac. 490.) it is now to be held that terms are surrendered *because* they are *satisfied*, there will be an end to all that the court has been doing upon this subject for a long time past.

that what may be done, may *under circumstances* be presumed to be done; consequently, as a term, notwithstanding it has been assigned to attend, may be surrendered to the owner of the freehold, a surrender of it *may* be presumed. But it must be remembered, that the declaration of the trust of such a term, by being incompatible with its legal nonexistence, involves a virtual inhibition of a surrender; and a circumstance to countervail it, ought to be of the most unambiguous complexion; as an enjoyment inconsistent with the existence of the term, disavowal of the tenancy thereunder by an attempt to bar it, &c.

Hence, until recently, it was understood, that when once a term had been assigned to attend the inheritance, a presumption of surrender never could arise merely from the lapse of time, and the intervention of circumstances or transactions which occurred without any mention of, or reference to the term. For the ground of that presumption being understood to be the intention of the parties, the implication of law was, according to the maxim, *expressum facit cessare tacitum*, prevented by the express declaration of the beneficial owner. And when the term had become attendant on the inheritance, it of course followed it *ad infinitum* in all its modifications; and did not, therefore, cease to be attendant, merely because it was unnoticed in a subsequent settlement, or because it was not again assigned on the sale of the lands, although by that assignment some advantages might (as we have seen) have been produced. Such *was* the doctrine.

But in the case of Doe v. Hilder (*d*), a term, which in 1779 *was assigned to attend*, was in 1819 presumed to be surrendered; the grounds of the determination being the lapse of time, and the occurrence of a marriage settlement and a mortgage in the meanwhile, without any notice of the term. The Lord Chief Justice, however, added some general arguments by analogy, assimilating the presumption of surrender in the principal case to that which arises in the case of a mortgagor and mortgagee in ejectment, removing the term which the former would make an obstacle to the latter's recovering the lands. But this argument seems to me to proceed on an erroneous assumption; for the authorities appear to warrant the substantive unqualified proposition, that a mortgagor shall not dispute the title of his mortgagee; and if he be precluded from calling it in question in *any* case, it must be shewn by those who refer the mortgagee's recovering in ejectment, when there is an outstanding

(*d*) 2 Bar. and Ald. 782.

term, to the doctrine of presumptive surrender, that under whatever circumstances that term may exist, it shall be presumed to be surrendered. To put, therefore, the strongest case: — Suppose it were assigned to attend the inheritance just before the mortgage, and the mortgagee brings ejectment shortly after, nothing having intervened in the meantime by which the term could have been noticed — does the mortgagee recover in this case on account of the term's being surrendered, if its existence be relied on by the mortgagor? If so, there must be an avowed abandonment of every principle; for surely when the presumption is raised at the trial, the absurdity will not be contended for, that it is the *trial* which raises it. Yet if no ejectment be brought, what is more certain than that the term has a legal, efficient, existence? The inconveniences of following the idea which has been mentioned, to its consequences, are too palpable to need enumeration. But it must likewise be admitted, that it would be unrighteous to allow the mortgagor to frustrate the legal remedy of the mortgagee; and the question is, whether there are no means of sustaining his action without calling in aid the doctrine of presumption. It appears to the writer that the more consistent reason for disallowing the mortgagor to set up a term in the trustee, would be, that he is estopped and concluded from disputing his own conveyance. And though a *release* does not as such work an estoppel (*e*), yet, as we have already seen, when the mortgage is by *any* conveyance by deed indented (*f*), the principle of estoppel is undoubtedly an adequate cause for precluding the mortgagor from disputing his mortgagee's title. (*g*)

The Chief Justice fortified his argument by referring to the general principle, that a presumption may arise when it is the most general means of accounting for a state of things, as in those cases in which the long enjoyment of a right of way creates the legal supposition of a grant; the long forbearance of it a release.

But as this argument assumes that the intervening circumstances between the assignment to attend, and the time at which the existence of the term was questioned, raised such a state of things as could only be accounted for by a presumption of surrender, we

(*e*) Sup. 7. (*f*) Co. Lit.. 45. a. Sup. 7.

(*g*) The analogy of this case to that of landlord and tenant is strong. The rule respecting the latter has relaxed the strictness of the ancient law which prevented the tenant from pleading *nil habuit in tenementis*, only when the lease was by deed indented. See Co. Litt. 45. a. But now every tenant is precluded from disputing his landlord's title at the time of the demise. See Syllivan v. Stradling, 2 Wils. 208.; also 1 Bar. and A. 53. 9 Moore's Rep. 130, 143.

are thrown back on the general doctrine already alluded to. Now although it is usual and proper to make a new assignment on every new *sale* of the land, it was for specific purposes only, and not from an opinion, that by omitting to do so, this valuable outwork of the title would be exposed to demolition by the doctrine of presumptions. And in marriage settlements, when there are none of those objects to attain, it has *never* been customary to assign outstanding terms afresh, or in any way notice them. When we consider, that if the term be attendant at the time of the settlement, the immediate effect of the latter is merely to new-modify the inheritance; and that by the nature of the trust the term must wait as well upon the various minor estates into which the fee-simple is distributed, as upon the fee in its original undivided form; it follows, that the only legitimate ground for presuming a surrender from the circumstance mentioned,—namely, an adverseness of possession in the cestuique trust, or (which is the cause of such adverseness) an inconsistency in the limitations of the settlement with the continuing trusts of the term,—was wanting to the argument we are examining.

But further, the court was avowedly influenced by the *equitable* doctrine of postponing claims to a right equally equitable; which, though of subsequent accruer, is aided by the possession of the legal estate. But although in certain instances the courts of law recognise trusts, it was going farther than any known legal principles of adjudication warrant, to get rid of a term by a presumption of its surrender on consideration of an entirely equitable nature. Yet this reason is one of the main pillars of Doe v. Hilder.

The circumstances in Doe v. Hilder were not, therefore, such as, in the strictness of legal construction, a presumption of surrender could be founded on. Still, however, as an enjoyment inconsistent with the term, or disavowal of the tenancy under it by an attempt to bar it, properly countervails the presumption resulting from the declaration of attendancy (*h*): by parity of reason, it is conceived, that a combination of other circumstances may be powerful enough to overcome it. As if the cestuique trust direct the term which has been assigned to attend, to be surrendered, or if there be no such positive, but only a circumstantial evidence of the same intent, as by an assignment of a subsequent or more recently created term to a trustee for the purchaser to attend the inheritance and bar the dower of the vendor's wife, the courts may presume a surrender. It certainly should seem that the fact indicating an intention to

(*h*) Sugd. Vend. 406. 7 Ed.

merge the prior attendant term, is equivalent to an express declaration,— nay stronger, — for if a direction that a term shall be surrendered be not followed up by an actual surrender, an alteration of intention may possibly be the ascribed cause ;— but this objection does not apply to the fact above mentioned;—and as the sole utility of the second term depends on the removal of the first, in consequence of the wife's equity under it being equal to the purchaser's, the inference of intent is irresistible. From the period, therefore, at which the counteracting manifestation of intent appears, the presumption of law consequent on the original declaration of trust ceases; and the outstanding term being therefore reduced to the same condition as a satisfied term never assigned, the conclusion is, that the time which has has been fixed by the above noticed analogy, begins to run, and that in 20 years it must be presumed to be surrendered.

We may conclude this important topic by observing, that the practice of excepting the term which is assigned to attend, as an incumbrance, has been condemned, on the ground of its being a protection, not an incumbrance. (*i*) And when the term is assigned by a separate deed, it is certainly improper — at all events inconsistent with the object of a separate deed, to notice it in the covenants; because in an ejectment by the beneficial owner, it would appear on the face of the conveyance, that the legal estate is in a trustee. Still, however, when it is considered, that covenants raise a common-law liability, that abstractedly from those objects and consequences which are purely of equitable cognisance, the term is unquestionably comprised in the specified incumbrances against which the purchaser is indemnified, and that every term is at *law* in *gross*, the censured practice seems to have proceeded on solid grounds. But of course the plaintiff in such an action would obtain only nominal damages; and the improbability of the omission being ever taken advantage of, is abundant reason for confining the exception of an outstanding term as an incumbrance, to those instances in which the inheritance is conveyed, and the term assigned in the same instrument.

(*i*) Sugd. Vend. 403. 7 Ed.

PRECEDENT III.

BY A DEVISEE IN TRUST FOR SALE AFTER THE DEATH OF CESTUIQUE TRUST FOR LIFE, WITH THE SURRENDER, BY AN EXECUTOR, OF THE MOIETY (*a*) OF AN OUTSTANDING TERM, THE OTHER MOIETY OF WHICH HAD MERGED.

THIS Indenture made, this, &c.

I. Parties. between R. Roberts, of, &c. of the first part, J. Jordan, of, &c. of the second part, and H. Herbert, of, &c. of the third part:

II. Recitals. "WHEREAS, by indentures of lease and release bearing date respectively on the and days of May, 1803, the release being made between T. Talbot of the one part, and J. Jacob (since deceased) of the other part, for the valuable considerations therein expressed, the hereditaments hereinafter described were conveyed to and to the use of the said J. Jacob and his heirs, but subject as therein mentioned to a rent-charge of 50*l.* to M. Matthews for her life:

1. Lease and release in fee subject to a rent-charge.

2. Annuitant's death. AND WHEREAS the said M. Matthews died some time in the year 1805, and the arrears of the said rent-charge were paid up to her death: AND" WHEREAS (1) the said J. Jacob by his will, dated on the day

3. Devise to trustees in trust

(*a*) The following facts likewise characterise this precedent, — viz. a sale by auction, and a part payment of the consideration money thereat.

of 1807, and duly executed and attested "for passing real estates," devised the said hereditaments to the said R. Roberts and to H. Jordan (since deceased) and their heirs (2) upon trust as therein mentioned for his son G. Jacob for his life; and after his decease upon further trust that they or the survivor of them should, as soon as conveniently might be after the death of his said son, sell the said hereditaments, either by public auction or private contract, and together or in parts, for the best price that could be got for the same; and the said testator directed that the money arising therefrom should be paid to the said trustees or the survivor of them; and that the receipts which should be given by them or him for such money, should be a legal discharge to the person or persons paying the same (3): AND WHEREAS the said J. Jacob died some time in the year 1808, without having altered or revoked his said will (4), which has been proved by the executors thereof in the prerogative court of Canterbury: AND WHEREAS the said G. Jacob died on the day of , 1809 (5): AND WHEREAS the said H. Jordan died on the day of , 1810, whereupon the legal estate in the whole of the said hereditaments survived to the said R. Roberts (6): AND WHEREAS the said R. Roberts, as such sur-

for testator's son, and after his death. upon trust to sell.

4. Death of testator.

5. Of Cestuique trust for life.

6. Of one of the trustees.

viving trustee, caused the said hereditaments to be put up for sale by public auction at , in the said county of , whereat
7. Sale by auction. the said H. Herbert attended, and having bid the sum of £ for the purchase of the said hereditaments, as hereinafter expressed, was declared the highest bidder for the
Deposit. same (7), and then paid down the sum of
III. Testatum. £ as a deposit (8): NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of
Purchase money. the sum of £ of sterling money, (as to the sum of £ , part thereof already paid by the said H. Herbert, by way of deposit as hereinbefore mentioned, and as to the sum of £ , residue thereof, to the said R. Roberts, paid by the said H. Herbert immediately before the execution of these presents) in full for the absolute purchase of the said hereditaments, and the fee-simple thereof, free from all incumbrances (except the land-tax charged thereon, amounting to the sum of £ per annum), the receipt whereof, accordingly the said R. Roberts doth hereby acknowledge, and from the same, by virtue of the before mentioned powers, doth also release the said H. Herbert, he the said R. Ro-
IV. Operative part. berts (as such surviving trustee), by these presents DOTH RELEASE unto the said H. Herbert (in his legal ownership, &c.) [*sup.* 18.]
Parcels. and his heirs ALL, &c.

V. Appurtenances. [*Appurtenances, supra,* 19.]

Deeds. [*Deeds, &c. ibid.*]

VI. Habendum. TO HAVE AND TO HOLD the said hereditaments hereinbefore described, with the appurtenances to, and to the use of the said H. Herbert and his heirs (9); [*covenant by R. Roberts, that he has done no act to incumber, sup.* 61. XV.]

Trustee's covenant.

VII. Second set of recitals. AND WHEREAS a term of 1000 years in the said hereditaments, was created by an indenture bearing date on or about the day of , 1789, and expressed to be made, &c., and after divers mesne events and assurances, the same term was ultimately, by an indenture, bearing even date with the hereinbefore recited indenture of release, and expressed to be made, &c., assigned to the said H. Jordan, deceased, in trust for the said J. Jacob, deceased, and his heirs, and to attend the inheritance (10): AND WHEREAS the said H. Jordan, by his will, bearing date on the day of , 1809, appointed the said J. Jordan, his executor and residuary legatee, who has proved the said will in, &c.: AND WHEREAS the said term of 1000 years, in a moiety of the said hereditaments, merged in the freehold thereof, under the devise in the hereinbefore recited will of the said J. Jacob (11); but the said H. Herbert is desirous of having the said term, in such of the said hereditaments as it now exists, surren-

1. Creation, and assignment of a term.

2. Assignee's will.

3. Merger of the term in a moiety of the lands.

Agreement with the trustee of the term.

dered to him, which the said J. Jordan, at the request of the said R. Roberts, hath agreed to do: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the same agreement, and in consideration of the premises (12), he, the said J. Jordan, as such executor of the said H. Jordan, as aforesaid, and at the request of the said R. Roberts, by these presents DOTH SURRENDER to the said H. Herbert, such of the hereditaments hereinbefore described, as are comprised in the said term of 1000 years, and not merged as aforesaid, TO THE INTENT that the same term may be forthwith merged in the freehold of the same hereditaments. (13) [Covenant by J. Jordan, that he has done no act to incumber, 61.] In witness, &c.

VIII. Second testatum.

(1) If these recitals be omitted, as they may be without impropriety, the deed will commence with the recital of testator's seisin, as in Prec. 5. II. The chief reason for inserting them, is to preserve presumptive evidence of the discharge of the rent-charge.

(2) Unless there are peculiar circumstances to form the case an exception to the general rule, the devise in trust for sale carries the fee without any limitation to the heirs of the devisee. (*a*)

(3) Sometimes the recital adds, "and exempt the purchaser or purchasers of the said premises from all necessity of looking to the application of his or their purchase-money." This clause is, of course, in the original trusts, but it may, at least, be omitted in the recital of them, as its effect is included in the trustee's power of giving receipts. It does not always follow, that the purchaser is obliged to look to the application of his money, when the trustee is not expressly authorised to give receipts. The general rule is, that

(*a*) Doe v. Willan, 2 B. & A. 84.

if the trusts are definite and specified, he is obliged (*b*); otherwise not. (*c*) Hence, a charge of debts generally, obviates this necessity.

(4) The form which this consequential recital assumes with some gentlemen, who, instead of stating the proof of the will in a particular court, as an independent fact, mention it as a medium of proof, that the will has not been revoked, seems objectionable. The least reflection shows that the proof is unsatisfactory, and by consequence the statement unscientific. For the will may be revoked, so far as the devise of the lands in question is concerned, by a conveyance and reconveyance; — by a conveyance to uses, in which the grantor takes the resulting use (*d*); nay, at law, even by a mortgage in fee. (*e*)

(5) The trustees could not execute the trust during the life of the cestuique trust for life; they could, however, have made a valid sale with his concurrence. It is incorrect to say here, as under similar circumstances, is sometimes done, "whereupon the said remainder in fee upon trust to sell, came into possession;"—if, as is assumed in the present instance, the legal estate is, from the nature of the primary trust, for the tenant for life, in the trustees from the beginning. For then the death of the cestuique trust is only the period at which the trust for sale is called into active operation.

(6) It is scarcely necessary to inform the student, that the dry legal estate of the trustee possesses the same legal properties as when clothed with the beneficial interest; and, consequently, the devise to the trustees gave them a joint-estate which, on the death of one of them, survives to the other.

(7) If an agent of the purchaser attended, and paid the money, express that fact.

(8) When trustees having a power to sell as they think fit, sell by auction, that fact should always be recited, because it is desirable to raise every presumption in favour of the fairness of the transaction; and the publicity of the auction carries with it that presumption far more strongly than a private contract.

(9) Since the declaration of use is legally identified with the limitation of the common law estate, this compendious mode of framing the habendum is conceived to be not only neater, but more accurate, than when it is followed by a distinct declaration of use to the purchaser.

(*b*) 2 Cha. Ca. 221. Show. 313.
(*c*) 1 Eq. Ca. Abr. 358. pl. 4. 3 Mer. 310.
(*d*) Dyer, 143. b. 1 Abr. Eq. 411. Show. Parl. Ca. 154.
(*e*) 1 Vern. 329. There are other means of effecting such an alteration of estate as will work a revocation. See 6 Cruise, Dig. tit. 38. c. 6.

10) This condensed mode of reciting the creation and devolution of the term attains the proposed object, (the delineation of the title to it), as well as the prolix mode at present in vogue.

(11) The general principle on which the whole doctrine of merger is founded, is the incompatibility of two estates of unequal quantity cotemporaneously existing in the same individual; whence the general deduction, that when a *minor* estate meets a larger, it coalesces with, and becomes extinguished in it. (*f*) To this rule there are some exceptions, which this is not the place to mention. We shall, however, notice one of them, as relevant to the circumstance before us. Before the statute of uses, the legal freehold which was conveyed to a trustee, did not extinguish in *equity* any terms which might be beneficially vested in him (*g*); it did, however, at law; and consonant to the resemblance between trusts and uses in their fiduciary state, it is clear that at *law* a perfect merger of a term is produced, when it coincides with the dry legal freehold in a trustee. — And when the term itself is, like the freehold, stripped of usufructuary ownership, *equity* can exercise no control over the effect of their reciprocal relation, and the extinguishment is consequently complete.

(12) We may omit the nominal consideration to the trustee as of no avail.

(13) This expression of intent is universally adopted; but it does not assist the operation of law, which cannot be precluded when a less and larger estate come together, and cannot be produced when such estates are separated by an intervening estate.

(*f*) 3 Lev. 437. Mr. Maddock's (1 Chanc. 509.) follows the statement of *this* rule, with the truly singular proposition, that it holds only where the legal and equitable estates are commensurate.

(*g*) See But. Co. Litt. 338. b.

PRECEDENT IV.

TO USES, ETC., BY DEVISEES IN TRUST FOR SALE, WITH THE SURRENDER AND ASSIGNMENT (BY WAY OF FURTHER ASSURANCE), OF A TERM BY A MORTGAGEE FOR YEARS.

I. Parties. This indenture, &c. BETWEEN W. Wilson of, &c. of the first part, B. Barry and G. Gross, of, &c. of the second part, H. Howard, of, &c. of third part, and J. Jones, of, &c. of the fourth part;

II. Recitals. 1. Last purchase deed. [Lease and release in fee to A. Ashton, *supra*, 17.]

2. Mortgage. [Mortgage by demise for 1000 years, from A. Ashton to W. Wilson, to secure £ , and interest, *supra*, 53.]

3. Will. [Will of A. Ashton, containing the devise to B. Barry and G. Gross, in fee in trust to sell, with power to give receipts, *supra*, 78.]

4. Death, &c. [Death of testator, &c. *ibid.*]

5. Contract. AND WHEREAS the said B. Barry and G. Gross, in pursuance of the trusts aforesaid, have contracted with the said H. Howard, for the sale of the said hereditaments as hereinafter mentioned, for the sum of : AND

6. Mortgage money and interest due. WHEREAS the said principal sum of £ is still due to the said W. Wilson, "on his recited security," with the sum of £, as an arrear of interest in respect thereof, making the aggregate sum of £ , "as the said B.

Barry and G. Gross hereby admit;" and it
Agreement with mortgagee. has been agreed between the said parties hereto, that the same sum shall be paid to the said W. Wilson, out of the said purchase money, and in consideration thereof, he hath consented to concur herein to surrender the said term of 1000 years to the said H. Howard, in order to merge the same: Now

III. Testatum. THIS INDENTURE WITNESSETH, that in pursuance of the recited agreement, and in consideration of the sum of £ of sterling money, to the said W. Wilson, with the consent of the said B. Barry and G. Gross, paid by the said H. Howard, immediately before the execution of these presents, in satisfaction of all principal money and interest due to the said W. Wilson, on his aforesaid security, the receipt whereof accordingly he doth hereby acknowledge, and therefrom release the said H. Howard, and also the said B. Barry, and G. Gross, and in consideration of the sum of £ of sterling money, to the said B. Barry and G. Gross, at the time aforesaid, also paid by the said H. Howard the receipt whereof, and also the payment of the said sum of £ as aforesaid, making the aggregate sum of £ , the said B. Barry and G. Gross do hereby respectively acknowledge and declare the same to be the full purchase money of the said hereditaments, and the fee-simple thereof, free from all incumbrances, and from

merge the prior attendant term, is equivalent to an express declaration,— nay stronger, — for if a direction that a term shall be surrendered be not followed up by an actual surrender, an alteration of intention may possibly be the ascribed cause ;— but this objection does not apply to the fact above mentioned ;—and as the sole utility of the second term depends on the removal of the first, in consequence of the wife's equity under it being equal to the purchaser's, the inference of intent is irresistible. From the period, therefore, at which the counteracting manifestation of intent appears, the presumption of law consequent on the original declaration of trust ceases; and the outstanding term being therefore reduced to the same condition as a satisfied term never assigned, the conclusion is, that the time which has has been fixed by the above noticed analogy, begins to run, and that in 20 years it must be presumed to be surrendered.

We may conclude this important topic by observing, that the practice of excepting the term which is assigned to attend, as an incumbrance, has been condemned, on the ground of its being a protection, not an incumbrance. (*i*) And when the term is assigned by a separate deed, it is certainly improper — at all events inconsistent with the object of a separate deed, to notice it in the covenants ; because in an ejectment by the beneficial owner, it would appear on the face of the conveyance, that the legal estate is in a trustee. Still, however, when it is considered, that covenants raise a common-law liability, that abstractedly from those objects and consequences which are purely of equitable cognisance, the term is unquestionably comprised in the specified incumbrances against which the purchaser is indemnified, and that every term is at *law* in *gross*, the censured practice seems to have proceeded on solid grounds. But of course the plaintiff in such an action would obtain only nominal damages; and the improbability of the omission being ever taken advantage of, is abundant reason for confining the exception of an outstanding term as an incumbrance, to those instances in which the inheritance is conveyed, and the term assigned in the same instrument.

(*i*) Sugd. Vend. 403. 7 Ed.

PRECEDENT III.

BY A DEVISEE IN TRUST FOR SALE AFTER THE DEATH OF CESTUIQUE TRUST FOR LIFE, WITH THE SURRENDER, BY AN EXECUTOR, OF THE MOIETY (*a*) OF AN OUTSTANDING TERM, THE OTHER MOIETY OF WHICH HAD MERGED.

THIS Indenture made, this, &c.

I. Parties. between R. Roberts, of, &c. of the first part, J. Jordan, of, &c. of the second part, and H. Herbert, of, &c. of the third part:

II. Recitals. "WHEREAS, by indentures of lease and release bearing date respectively on the and days of May, 1803, the release being made between T. Talbot of the one part, and J. Jacob (since deceased) of the other part, for the valuable considerations therein expressed, the hereditaments hereinafter described were conveyed to and to the use of the said J. Jacob and his heirs, but subject as therein mentioned to a rent-charge of 50*l.* to M. Matthews for her life:

1. Lease and release in fee subject to a rent-charge.

2. Annuitant's death. AND WHEREAS the said M. Matthews died some time in the year 1805, and the arrears of the said rent-charge were paid up to her death:

3. Devise to trustees in trust AND" WHEREAS (1) the said J. Jacob by his will, dated on the day

(*a*) The following facts likewise characterise this precedent, — viz. a sale by auction, and a part payment of the consideration money thereat.

of 1807, and duly executed and attested "for passing real estates," devised the said hereditaments to the said R. Roberts and to H. Jordan (since deceased) and their heirs (2) upon trust as therein mentioned for his son G. Jacob for his life; and after his decease upon further trust that they or the survivor of them should, as soon as conveniently might be after the death of his said son, sell the said hereditaments, either by public auction or private contract, and together or in parts, for the best price that could be got for the same; and the said testator directed that the money arising therefrom should be paid to the said trustees or the survivor of them; and that the receipts which should be given by them or him for such money, should be a legal discharge to the person or persons paying the same (3): AND WHEREAS the said J. Jacob died some time in the year 1808, without having altered or revoked his said will (4), which has been proved by the executors thereof in the prerogative court of Canterbury: AND WHEREAS the said G. Jacob died on the day of , 1809 (5): AND WHEREAS the said H. Jordan died on the day of , 1810, whereupon the legal estate in the whole of the said hereditaments survived to the said R. Roberts (6): AND WHEREAS the said R. Roberts, as such sur-

for testator's son, and after his death upon trust to sell.

4. Death of testator.

5. Of Cestuique trust for life.

6. Of one of the trustees.

viving trustee, caused the said hereditaments to be put up for sale by public auction at , in the said county of , whereat
7. Sale by auction. the said H. Herbert attended, and having bid the sum of £ for the purchase of the said hereditaments, as hereinafter expressed, was declared the highest bidder for the
Deposit. same (7), and then paid down the sum of
III. Testatum. £ as a deposit (8): NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of
Purchase money. the sum of £ of sterling money, (as to the sum of £ , part thereof already paid by the said H. Herbert, by way of deposit as hereinbefore mentioned, and as to the sum of £ , residue thereof, to the said R. Roberts, paid by the said H. Herbert immediately before the execution of these presents) in full for the absolute purchase of the said hereditaments, and the fee-simple thereof, free from all incumbrances (except the land-tax charged thereon, amounting to the sum of £ per annum), the receipt whereof, accordingly the said R. Roberts doth hereby acknowledge, and from the same, by virtue of the before mentioned powers, doth also release the said H. Herbert, he the said R. Ro-
IV. Operative part. berts (as such surviving trustee), by these presents DOTH RELEASE unto the said H. Herbert (in his legal ownership, &c.) [*sup.* 18.]
Parcels. and his heirs ALL, &c.

V. Appurtenances. [*Appurtenances, supra,* 19.]

Deeds. [*Deeds, &c. ibid.*]

VI. Habendum. TO HAVE AND TO HOLD the said hereditaments hereinbefore described, with the appurtenances to, and to the use of the said H. Herbert and his heirs (9); [*covenant by R. Roberts, that he has done no act to incumber, sup.* 61. XV.]

Trustee's covenant.

VII. Second set of recitals. AND WHEREAS a term of 1000 years in the said hereditaments, was created by an indenture bearing date on or about the day of , 1789, and expressed to be made, &c., and after divers mesne events and assurances, the same term was ultimately, by an indenture, bearing even date with the hereinbefore recited indenture of release, and expressed to be made, &c., assigned to the said H. Jordan, deceased, in trust for the said J. Jacob, deceased, and his heirs, and to attend the inheritance (10): AND WHEREAS the said H. Jordan, by his will, bearing date on the day of , 1809, appointed the said J. Jordan, his executor and residuary legatee, who has proved the said will in, &c.: AND WHEREAS the said term of 1000 years, in a moiety of the said hereditaments, merged in the freehold thereof, under the devise in the hereinbefore recited will of the said J. Jacob (11); but the said H. Herbert is desirous of having the said term, in such of the said hereditaments as it now exists, surren-

1. Creation, and assignment of a term.

2. Assignee's will.

3. Merger of the term in a moiety of the lands.

Agreement with the trustee of the term.

dered to him, which the said J. Jordan, at the request of the said R. Roberts, hath agreed to do: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the same agreement, and in consideration of the premises (12), he, the said J. Jordan, as such executor of the said H. Jordan, as aforesaid, and at the request of the said R. Roberts, by these presents DOTH SURRENDER to the said H. Herbert, such of the hereditaments hereinbefore described, as are comprised in the said term of 1000 years, and not merged as aforesaid, TO THE INTENT that the same term may be forthwith merged in the freehold of the same hereditaments. (13) [Covenant by J. Jordan, that he has done no act to incumber, 61.] In witness, &c.

VIII. Second testatum.

(1) If these recitals be omitted, as they may be without impropriety, the deed will commence with the recital of testator's seisin, as in Prec. 5. II. The chief reason for inserting them, is to preserve presumptive evidence of the discharge of the rent-charge.

(2) Unless there are peculiar circumstances to form the case an exception to the general rule, the devise in trust for sale carries the fee without any limitation to the heirs of the devisee. (*a*)

(3) Sometimes the recital adds, "and exempt the purchaser or purchasers of the said premises from all necessity of looking to the application of his or their purchase-money." This clause is, of course, in the original trusts, but it may, at least, be omitted in the recital of them, as its effect is included in the trustee's power of giving receipts. It does not always follow, that the purchaser is obliged to look to the application of his money, when the trustee is not expressly authorised to give receipts. The general rule is, that

(*a*) Doe v. Willan, 2 B. & A. 84.

if the trusts are definite and specified, he is obliged (*b*); otherwise not. (*c*) Hence, a charge of debts generally, obviates this necessity.

(4) The form which this consequential recital assumes with some gentlemen, who, instead of stating the proof of the will in a particular court, as an independent fact, mention it as a medium of proof, that the will has not been revoked, seems objectionable. The least reflection shows that the proof is unsatisfactory, and by consequence the statement unscientific. For the will may be revoked, so far as the devise of the lands in question is concerned, by a conveyance and reconveyance; — by a conveyance to uses, in which the grantor takes the resulting use (*d*); nay, at law, even by a mortgage in fee. (*e*)

(5) The trustees could not execute the trust during the life of the cestuique trust for life; they could, however, have made a valid sale with his concurrence. It is incorrect to say here, as under similar circumstances, is sometimes done, "whereupon the said remainder in fee upon trust to sell, came into possession;"—if, as is assumed in the present instance, the legal estate is, from the nature of the primary trust, for the tenant for life, in the trustees from the beginning. For then the death of the cestuique trust is only the period at which the trust for sale is called into active operation.

(6) It is scarcely necessary to inform the student, that the dry legal estate of the trustee possesses the same legal properties as when clothed with the beneficial interest; and, consequently, the devise to the trustees gave them a joint-estate which, on the death of one of them, survives to the other.

(7) If an agent of the purchaser attended, and paid the money, express that fact.

(8) When trustees having a power to sell as they think fit, sell by auction, that fact should always be recited, because it is desirable to raise every presumption in favour of the fairness of the transaction; and the publicity of the auction carries with it that presumption far more strongly than a private contract.

(9) Since the declaration of use is legally identified with the limitation of the common law estate, this compendious mode of framing the habendum is conceived to be not only neater, but more accurate, than when it is followed by a distinct declaration of use to the purchaser.

(*b*) 2 Cha. Ca. 221. Show. 313.
(*c*) 1 Eq. Ca. Abr. 358. pl. 4. 3 Mer. 310.
(*d*) Dyer, 143. b. 1 Abr. Eq. 411. Show. Parl. Ca. 154.
(*e*) 1 Vern. 329. There are other means of effecting such an alteration of estate as will work a revocation. See 6 Cruise, Dig. tit. 38. c. 6.

10) This condensed mode of reciting the creation and devolution of the term attains the proposed object, (the delineation of the title to it), as well as the prolix mode at present in vogue.

(11) The general principle on which the whole doctrine of merger is founded, is the incompatibility of two estates of unequal quantity cotemporaneously existing in the same individual; whence the general deduction, that when a *minor* estate meets a larger, it coalesces with, and becomes extinguished in it. (*f*) To this rule there are some exceptions, which this is not the place to mention. We shall, however, notice one of them, as relevant to the circumstance before us. Before the statute of uses, the legal freehold which was conveyed to a trustee, did not extinguish in *equity* any terms which might be beneficially vested in him (*g*); it did, however, at law; and consonant to the resemblance between trusts and uses in their fiduciary state, it is clear that at *law* a perfect merger of a term is produced, when it coincides with the dry legal freehold in a trustee. — And when the term itself is, like the freehold, stripped of usufructuary ownership, *equity* can exercise no control over the effect of their reciprocal relation, and the extinguishment is consequently complete.

(12) We may omit the nominal consideration to the trustee as of no avail.

(13) This expression of intent is universally adopted; but it does not assist the operation of law, which cannot be precluded when a less and larger estate come together, and cannot be produced when such estates are separated by an intervening estate.

(*f*) 3 Lev. 437. Mr. Maddock's (1 Chanc. 509.) follows the statement of *this* rule, with the truly singular proposition, that it holds only where the legal and equitable estates are commensurate.

(*g*) See But. Co. Litt. 338. b.

III. Testatum. deceased (8): NOW, THEREFORE, THIS INDENTURE WITNESSETH, that in consideration of £ of, &c. to the said G. Carr, &c. [*vid. supra*, 18.]

They, the said (9) J. Gay and C. Carr, as such devisees in trust as aforesaid, at the request of the said G. Carr (party hereto) (10),

IV. Operative part. by these presents DO release, and the said C. Carr, in respect to any right of dower which may have accrued to her as aforesaid, by these presents DOTH release (11), and the said G. Carr, by these presents DOTH grant (12), release (13), and confirm, unto the said B.

Bargain and sale. Barnes, [in his, &c. *supra*, 18.]

Parcels. and his heirs all &c. (*Parcels.*)

Appurtenances. [Appurtenances, *supra*, 19.]

Deeds. [Clause of deeds, *supra*, 19.]

Habendum. [HABENDUM to the purchaser in fee to uses, for barring dower, *supra*, 19.]

Covenant by trustees. AND each of them, the said J. Gay and C. Carr, as such trustees as aforesaid, and also the said C. Carr, as such dowress as aforesaid, severally, &c. [Covenant that they have done no act to incumber, *sup.* 60. IX.] And the said G. Carr, doth hereby for himself and his heirs, covenant with the said B. Barnes, his appointees, heirs and assigns, that notwithstanding any thing made, done, or suffered, by the said J. Gay, C. Carr, G. Carr, (party hereto), or the said G. Carr, deceased, (except as hereinafter excepted), they

the said J. Gay, C. Carr, or G. Carr, party hereto, now have, &c. [*supra*, 20.] *adding, however, to the covenantor's name the names of the others whom the covenants embrace. Thus, in the covenant for quiet enjoyment, say* — without any interruption, &c. from the said J. Gay, C. Carr, or G. Carr, (party hereto) or any person or persons lawfully or equitably claiming "any interest in the said hereditaments or any of them, or any part thereof," through, under, or in trust for the said J. Gay, &c. or any of them, or the said G. Carr, deceased, (except as hereinafter excepted.) *In the covenant against incumbrances add,* — occasioned, &c. by the J. Gay, C. Carr, G. Carr, (party hereto) or the said G. Carr, deceased, or any person or persons lawfully or equitably claiming "any interest in the said hereditaments, &c." through, under, or in trust for them or any of them, or by their or any of their means "or default," (except in respect of the aforesaid annuity of £ ." *In the covenant for further assurance say* — AND ALSO that they the said J. Gay, C. Carr, and G. Carr, (party hereto) and their heirs, and every person, &c., lawfully or equitably claiming, &c. under or in trust for them or any of them, or the said G. Carr, deceased, shall &c. AND WHEREAS (14), by an indenture bearing date on or about the, &c. and expressed to be made between R. Rowe of the one part,

V. 1. Creation of mortgage.

Term by appointment.

and J. James of the other part, for the considerations therein mentioned, the said R. Rowe did appoint and demise, among other hereditaments, the hereditaments aforesaid to the said J. James, from the day of the date thereof, for the term of 500 years, subject to a proviso for cesser on payment by the said R. Rowe to the said J. James, of a principal sum therein mentioned, with interest for the same on a day therein named, and since past without any such payment having been made, by reason whereof the said term became absolute: AND WHEREAS the same principal sum, and all interest due thereon, have been since paid, and by an indenture bearing date on or about the day of , the residue of the said term in the said hereditaments was assigned to the said T. Tope, in trust to attend the inheritance: AND WHEREAS the said T. Tope hath agreed, at the request of the said G. Carr, (party hereto) to assign the residue of the said term, so far as the same relates to the hereditaments hereby released, to the said T. Taylor, upon trust for the said B. Barnes, as hereinafter mentioned: NOW THIS INDENTURE WITNESSETH: *supra*, 60. XII. (*a*)

2. Money paid, and term assigned to attend.

3. Trustee's agreement to assign to purchaser's trustee.

Second testatum, &c.

[Assignment, *supra*, 61. XIII.]

Trustee's covenant.

[Covenant by T. Tope, that he has done no act to incumber, 61.] In witness, &c.

(*a*) Substituting, however, "*in pursuance of this agreement*," for "*in consideration*," &c.

(1) C. Carr is again made a party, because she acts in two distinct capacities.

(2) The strict legal effect of these words in a devise like the present, is now suffered by the courts of law to be controlled by the nature of the trust; — a strange (*a*), but established (*b*) anomaly.

(3) The trustees are not required by the nature of the trust to take the whole legal fee, but only an estate during the life of the annuitant, to which, therefore, the antecedent limitation is restrained.

(4) If the devise had been merely to the trustees and their heirs, until the son attained twenty-one, and then to him, he would have taken a vested remainder, expectant on their estate, which would have been but a chattel interest, in consequence of its being bounded by fixed determinate limits. (*c*) And in the present instance it should seem clear, that the trustees would not be held to take a base fee, determinable by a shifting or executory devise in the son's, but either a chattel interest, or, at the most, an estate *pur auter vie* (*d*); that being all which the trust requires. Hence the son, on attaining twenty-one, took an equitable interest in possession, subject to the annuity, and a legal vested remainder expectant on the chattel real or descendible freehold of the trustees.

(5) This statement is proper; for it has been held that every will and every codicil must be separately attested by three witnesses (*e*); and though doubts have been breathed on this doctrine (*f*), the decisions which establish it have not been overruled. When, however, a codicil is written on the same sheet of paper with the will, the attestation of the codicil, by three witnesses, establishes the will, though not duly attested. (*g*)

(6) We have already seen, that if the annuity of J. Carr had been a legal rent-charge, this purpose could not have been effected by her releasing the purchased hereditaments only.

(7) A good title could not be made without the concurrence of the trustees; as they retain the legal estate during the life of the annuitant.

(*a*) See 1 Eden, 119. at least when the trustees are held to take a chattel interest. (*b*) 1 Burr. 222. 3 T. Rep. 41. 16 Ves. 491.

(*c*) 1 Bar. & Cresw. 721. 2 Brod. & Bing. 349.

(*d*) Authority (vid. Warter v. Hutchinson, 1 Bar. & Cresw. 721. 5 Moore, 143.) favours the former, but principle (the author respectfully suggests) the latter conclusion; as the same end (viz. the vesting of the ulterior limitation) is attained by it, without any violence to the language of the instrument. This class of cases is still at sea, tormented by the conflict of old and narrow technicalities, with equitable principles, and social considerations.

(*e*) Rep. temp. Holt. 742. (*f*) 2 Ves. J. 228. 3 Burr. R. 1775.

(*g*) 16 Ves. 167. 1 Ves. & B. 445.

(8) Some gentlemen would add here ("but which hath not been assigned to her.") But we may omit this statement, for as the assignment completes the legal title of the dowress, and she has thereupon an actual estate (*h*), which is not releasable (as a right) to the owner of the inheritance, the fact which it expresses is evidently involved in the description of the subject matter — *any right to dower.*

(9) The nominal consideration to the trustees is omitted for reasons above given. (*i*)

(10) The reader will observe, that this descriptive expression is not repeated throughout; as is usually done. For as its only use is to identify the individual, it seems ridiculous to adopt it, when by no possibility, the person to whom it is applied can be any other than the party to the instrument.

(11) As the interest of the widow is a mere right, not an estate, this release operates by way of extinguishment. Had the dower been assigned to her, she could only have surrendered.

(12) To make as close an advance as possible to accuracy, we may throw in the word *grant* here, as more peculiarly applicable, not only to the vendor's vested remainder, but from its generic nature, to the transfer of an equitable interest.

(13) If G. Carr had taken, instead of a vested remainder, only an executory interest, this release would have operated by way of extinguishment; for a release by way of enlargement is precluded from passing such an interest for the same reason that a grant is.

(14) This is the *usual* place for introducing the recitals relating to the term, when it is conveyed by the same instrument with the inheritance. When the term to be assigned is a satisfied term, it would be considered inartificial to introduce them among the recitals which respect the title of the inheritance.

(*h*) Gib. Ten. 26. (*i*) Sup. 90. (4.)

PRECEDENT VII.

TO USES, ETC. BY TENANTS IN COMMON, WITH A DECLARATION OF THE USES OF A FINE, IN WHICH AN ANNUITANT CONCURS; AND WITH THE SURRENDER OF A MORTGAGE TERM (1), COMPRISING OTHER PROPERTY OF THE VENDORS.

THIS INDENTURE, &c.

I. Parties. Between M. Mason, of, &c. and M. his wife, and H. Hoare, of, &c. and H. his wife, of the first part, E. Emmet, of, &c. of the second part, J. Jacobs, of, &c. and E. his wife, of the third part, T. Tucker, of, &c. of the fourth part (2), F. Farwell, of, &c. of the fifth part, and B. Bowles, of, &c. of the sixth part: WHEREAS, by an indenture (3), bearing date on, &c. being, so far as the same is grounded on a bargain and sale bearing date the day next before the day of the date of the same indenture, a release of the hereditaments hereinafter described (4), and made between E. Eales, of the one part, and J. Jacobs, since deceased, of the other part, for the valuable considerations therein expressed, the same hereditaments were appointed and released respectively to, and to the use of the said J. Jacobs, and his heirs.

II. Recitals. 1. Appointment and release.

2. Mortgage for years. [Mortgage of (among others) the said here-

ditaments for 1000 years, from J. Jacobs to J. Jones, *ut supra*, 53.] (5)

3. Mortgee's will. AND WHEREAS, the said J. Jones duly made and published his last will, in writing (6), bearing date on, &c., and appointed the said E. Emmet and P. Page executors thereof, who duly proved the same in the

4. Death of one of his executors. court of , on the day of (7): AND WHEREAS the said P. Page died on the day of :

5. Mortgagor's will. AND WHEREAS the said J. Jacobs, deceased, by his last will, bearing date on the day of , and duly executed and attested, devised the hereditaments hereafter described to the said M. Mason and H. Hoare, and their heirs, equally (8) between them; but subject to a rent-charge, of £ to the the said E. Jacobs, during her life.

6. Death. [*Death of testator, and probate*, ut supra, 88. 2.]

7. Contract. *Contract for sale by M. Mason, and H. Hoare, to F. Farwell*, ut supra, 18.]

8. Mortgage money due. AND WHEREAS the said principal sum of £ , with the sum of £ for "an arrear of" interest in respect thereof, up to the date of these presents, making the aggregate sum of £ , is now due to the said E. Emmet, "as such surviving executor, as aforesaid," to whom, therefore, it has been agreed between the said parties hereto, that the purchase money aforesaid shall be paid, in consideration whereof he hath agreed to concur herein,

Agreement with mortgagee.

8. Agreement of annuitant to concur in a fine.

for the purpose hereafter mentioned; and the said J. Jacobs and E. his wife have also agreed, respectively, to concur herein, and in a fine to be levied as hereafter mentioned, in order to extinguish the aforesaid rent-charge, and generally it hath been agreed, that the said purchased hereditaments shall be conveyed to the said F. Farwell to the uses hereafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of sterling money to the said E. Emmet, "as such surviving executor as aforesaid," paid by the said F. Farwell, at the request of the said M. Mason and H. Hoare, immediately before the execution of these presents, in part satisfaction of the said principal money and interest, the receipt of which said sum of £ the said E. Emmet doth hereby acknowledge, and release from the same the said F. Farwell, and also the said M. Mason and H. Hoare respectively; and the payment whereof, and that the same is in full for the absolute purchase of the said hereditaments hereinafter described, "and the fee-simple thereof," free from all incumbrances, the said M. Mason and H. Hoare hereby admit, and from the same sum respectively release the said F. Farwell; they, the said M. Mason and H. Hoare, by these presents DO RELEASE, and the said E. Emmet,

III. Testatum.

Payment of the purchase money to the executor.

IV. Operative part.

1. Release by endorsement.

as such surviving executor as aforesaid, to the intent to merge the aforesaid term of 1000 years, at the request of the said M. Mason and H. Hoare, by these presents DOTH SURRENDER, and the said J. Jacobs and E. his wife, to the intent to extinguish the said rent-charge of £ , devised to the said E. Jacobs as aforesaid, by these presents DO RELEASE unto the said F. Farwell. [Reference to the bargain and sale—the bargainors, M. Mason and H. Hoare, *supra*, 18—59.] and to his heirs. [*Parcels.*] [*Appurtenances*, ut supra, 19.] *Deeds*, ibid.]

2. Surrender.

3. Release by extinguishment.

V. Habendum. [*Habendum to F. Farwell, in fee to uses for barring dower*, ut supra, 19, 20.]

VI. Recital of the acknowledgement of a fine. AND WHEREAS in further performance of the aforesaid agreement, the said M. Mason and M. his wife, H. Hoare and H. his wife, and J. Jacobs and E. his wife, have, on the day of the date of these presents, respectively acknowledged one fine sur conuzance de droit come ceo to be levied unto the said T. Tucker of (among other hereditaments) the hereditaments hereinbefore described (9), and the said fine is intended to be perfected with all convenient speed, and entered upon record in his Majesty's court of common pleas at Westminster, and to be proclaimed (10) according to the statutes in that behalf: NOW THIS INDENTURE FURTHER WITNESSETH, that for the considerations

VII. Further testatum.

aforesaid, the said M. Mason and M. his wife, H. Hoare and H. His wife (11), and J. Jacobs and E. his wife, according to their respective interests, do hereby declare, and the said T. Tucker doth hereby admit, that the said fine, "so acknowledged and to be levied as aforesaid," is intended to include, among other hereditaments, the hereditaments hereinbefore described, to enure to the uses hereinbefore limited, and in confirmation (12) of the insurance hereinbefore made, and to the intent, so far as respects the said M. Mason* and H. Hoare,* to extinguish their respective rights to dower in the said hereditaments, and as to the said J. Jacobs and E. his wife, to extinguish the rent-charge so devised to the said E. Jacobs as aforesaid.

Declaration of the uses of the fine.

* *The wives.*

VIII. Covenants.

1. By mortgagee.

[Covenant by E. Emmet with F. Farwell, that he has done no act to incumber, *supra*, 61.]

2. By annuitant's husband.

AND the said J. Jacobs doth hereby, for himself and his heirs, covenant with the said F. Farwell, his appointees, heirs, and assigns, that they the said J. Jacobs and his said wife have not, nor has either of them, made, done, or suffered, any thing whereby the said hereditaments, or any part thereof, can remain in any manner subject to the said rent-charge of *l.* or any ar-

3. For the title by vendors.

rears thereof: AND each of them, the said M. Mason and H. Hoare, to the value of one undivided moiety only of the said hereditaments hereinbefore described, doth hereby, for himself and his heirs, covenant with the said F. Farwell, his appointees, heirs, and assigns, that notwithstanding any thing made, done, or suffered, by the said M. Mason, or H. Hoare, or the said E. Emmet, J. Jones, deceased, J. Jacobs, party hereto, or E. his wife, or by the said J. Jacobs, deceased, except as hereinafter is excepted, they the said M. Mason and H. Hoare now have, &c. [*vid. supra*, 20. and 94—5.] In witness, &c.

(1) Another precedent of a surrender in the same instrument with the release is given, because it may with propriety assume the following form, in which it is apparently embodied with the conveyance of the fee. It is within my design to instance those varieties which arise from the taste of the draftsman, as well as those which are produced by different combinations of circumstances.

(2) It is usual to make the conuzee of a fine, and the demandant in a recovery, parties to the conveyance in which the uses are declared. Of course, however, it is not *necessary*, even when the uses of the deed depend on their seisin; for that is vested in them as the result of those fictitious suits in which they are the plaintiffs.

(3) Conveyancers of modern times advise us in recitals not to predicate the nature of the assurance, but to leave its operation to be inferred from its form; with the exception, however, of a lease and release.

(4) Partly for the reason given in a preceding note, partly from its intrinsic inaccuracy, I object to the usual mode of reciting a lease and release when the latter assurance is subordinate and auxiliary to an appointment in the same instrument. In the absence of proof to the contrary, it must be assumed that the ap-

pointment is valid; and, if so, the release by way of further assurance is not called into action; and in effect, therefore, is *not* a release. On the same assumption the bargain and sale is likewise precluded from operation. How incorrect it is, therefore, to affirm that the estate was assured *by indentures of lease, release, and appointment*, is abundantly clear.

Another mode of giving this recital, and far more accurate than the last mentioned one, is to shew that the lease is in one instrument, and the release and appointment in another — thus, "whereas by indenture of lease, and indenture of release and appointment." It is here observable, that as an indenture may operate simultaneously as a release and *assignment*, by the different assurances respectively referring to their appropriate interests, the principle on which this form of recital is objected to in respect to *appointments*, is inapplicable to *assignments*.

(5) With, however, this addition in the proviso for cesser, — viz. "on payment by the said J. Jacobs, his *heirs, executors, administrators, or assigns*, unto the said J. Jones, his *executors, administrators, or assigns*; because both the mortgagor and mortgagee are in the present instance dead.

(6) It is usual to add these words (in writing) in reciting a will of *realty*; but I have rejected them from *thence*, as being necessarily involved in the simple affirmation of a will; for a testamentary act is, in respect to freeholds, a total nullity, both at law and in equity, unless it is not only in writing, but attended by particular solemnities. But this reason is inapplicable to a will of *chattels*, which, still depending on the doctrines of the civil law, may be either written or nuncupative.

(7) As an administration or probate is void (and by consequence the title of a term which depends on it bad), if the court it is obtained from has no jurisdiction, it has become a common, and certainly a proper practice with conveyancers, to require the will to be proved, or the letters granted by the prerogative court, not only when there is reason to suspect that there are *bonâ notabilia* in different dioceses (*a*), but when, from the lapse of time, or from other causes, the vendor is unable to preclude, by satisfactory evidence, the danger of resorting to an inferior court. The metropolitan courts are generally styled, "*the Prerogative Court of the Archbishop of* [Canterbury, or York].

(*a*) See the doctrine of the ecclesiastical law with respect to *bonâ notabilia*, 4 Burn, E. L. tit. Probate.

(8) It was long since held, that the words "equally to be divided," would make a tenancy in common in a will (*b*), and, indeed, they have been determined to produce the same effect in a conveyance to uses. (*c*) It is now settled that the word "*equally*," alone, does in a will make a tenancy in common. (*d*) In consequence of the feudal policy which *gave construction a leaning in favour of joint-tenancies*, having ceased to operate, and that species of modification being for several reasons, but more especially on account of the *jus accrescendi*, or right of survivorship, less responsive to the wants, and less agreeable to the ideas of modern times, than a tenancy in common, the courts have struggled with, and, indeed, subverted the ancient principle, so far as to exclude it from devises.

(9) In a declaration of the uses of either a fine or recovery, the lands ought to be described with much minuteness and accuracy, as that description usually guides the jury.

(10) It may be observed, that although a fine is now, as a matter of course, levied with proclamations, they are not essential to the efficient transfer of the estate of a married woman. (*e*)

(11) The rules with respect to a direction or declaration of uses by baron and feme, are peculiar and deserving attention. It is true, generally, that a coincidence in their declarations is requisite to their validity (*f*): but this rule is qualified by a distinction between the estate and the land; a disagreement in the former, though partial only, being fatal; in the latter, vitiating the disposition of so much of the subject matter (so to express myself), as the disagreement comprises. (*g*) On this distinction another has been grafted. It has been contended, that the disagreement in the former case is fatal, only when it relates to the first uses declared (*h*), as those are the support of the rest; and by consequence, when void, necessarily draw them likewise to the ground. This argument is plausible; but it would not be completely tenable, had the principle on which it founds itself been that to which it is correctly referrible. For admitting the true ground of invalidating the conflicting declarations of baron and feme to be the privation of the support of the ulterior uses, still it would apply only to those cases in which they were dependent on the prior estate as *remainders*,

(*b*) 3 Rep. 39. 1 Vent. 216—227. (*c*) 2 Ves. 252. 3 Atk. 734.
(*d*) Cro. Eliz. 695. 1 Vern. 32. Cowp. 657.
(*e*) 5 Cruise, Dig. 207. 2 Ed. (*f*) 2 Rep. 58. a. Dyer, 146. b.
(*g*) 2 Co. 57, 58. Moor, 196. (*h*) 1 Prest. Conv. 314.

and could, from the mode of limitation, enure in no other way. For if they could take effect as future uses, then, as they would be independent of the anterior limitations, no reason can be deduced from this principle for making their annihilation consequent on that of the preceding uses. But it is believed the authorities do not warrant the idea of the subsequent uses failing from their inextricable connection with the prior. The cause seems to be, that one use is the *consideration* of the other; and that by the disagreement of the declarations, such consideration fails. (*i*)

(12) It is material for the student to observe, that the fine, when levied, will enure only by way of confirmation; making that a good and unavoidable estate in the purchaser, which would otherwise be defeasible, at least, in part, by the married women, should they survive their husbands; for if the seisin passed to the conuzee instead of to the purchaser, the covenants would be entered into with the wrong person.

PRECEDENT VIII.

BY AN EXECUTOR, AS THE DONEE OF A NAKED AUTHORITY (1) IN A WILL DEFECTIVELY EXECUTED, WITH THE CONCURRENCE OF THE HEIR AND INTENDED CESTUIQUE TRUSTS OF THE PURCHASE MONEY.

THIS INDENTURE, &c.

1. Parties. between S. Simpson, of, &c. of the first part, M. Matthews, of, &c. of the second part, H. Harris, of, &c. widow of the third part, B. Bird, of, &c. of the fourth part, and L.

(*i*) See Sugd. Gilb. Uses, 41. n. 3.

II. Recitals. Lloyd, of, &c. of the fifth part: WHEREAS J. Simpson, late of , &c. being seised in absolute fee-simple by purchase, for a valuable consideration, of the hereditaments hereinafter described, died on the day

1. Will. of , leaving an instrument in writing, purporting to be his last will, and bearing

Being a devise for life with a direction to the executor to sell after the death of tenant for life. date on the day , whereby he devised the said hereditaments to his then wife, L. Simpson, for her life, and after her death directed his executor to sell the same, either by public auction or private contract, for the best price that could be obtained for the same, and to divide such sum equally among such of his children as should be then living; and the said testator appointed the said M. Matthews executor of his said will, who duly proved the same, on the day

2. Defectively executed. of , in the court of : AND WHEREAS, by reason of the said will being executed in the presence of two witnesses only, the said hereditaments have descended to the said S. Simpson, the eldest son of the said testator, but he being desirous of effectuating the intention of his said father,

Agreement of the heir. hath agreed, as heir at law distinctly, to concur in the conveyance of the said hereditaments in the manner hereinafter

3. Death of tenant for life, appearing (2): AND WHEREAS the said L. Simpson enjoyed the said hereditaments during her life, and died in the month

leaving children. of, &c. leaving the said S. Simpson and H. Harris, the children of the said testator, her surviving: AND WHEREAS the said M. Matthews, as such executor as aforesaid, with the concurrence of the said S. Simpson as heir at law as aforesaid, and of him and the said H. Harris as such cestuique trusts of the said purchase money as aforesaid, shortly since contracted with the said B. Bird for the sale of the aforesaid hereditaments as hereinafter mentioned, for the price of £ , "to be conveyed to the said B. Bird in the manner hereinafter appearing:" NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of sterling money to the said M. Matthews, as such executor as aforesaid, by the direction of the said S. Simpson (as such heir at law as aforesaid), and also of the said S. Simpson and H. Harris (as such cestuique trusts as aforesaid), paid by the said B. Bird, immediately before the execution of these presents, in full for the absolute purchase of the said hereditaments hereinafter described, "and the fee-simple thereof" free from all incumbrances (except the land-tax), the receipt of which said sum of £ the said M. Matthews doth hereby acknowledge, and the payment whereof to him, they the said S. Simpson and H. Harris,

4. Contract by the executor.

III. Testatum.

Payment to the executor.

"the former as such heir at law, and both of them as such cestuique trusts as aforesaid," do hereby admit, and from the same sum, they and the said M. Matthews do hereby release the said B. Bird, he the said S. Simpson, as such heir at law as aforesaid, and also as one of the cestuique trusts under the hereinbefore recited will, by these presents DOTH RELEASE, and the said M. Matthews, as such executor as aforesaid, and in exercise of the power contained in the same will, by these presents DOTH BARGAIN AND SELL (3), and the said H. Harris, as such other cestuique trust as aforesaid, by these presents DOTH CONFIRM unto the said B. Bird (in his, &c. [*supra*, 18, the bargainor S. Simpson, alone]).

IV. Operative part.
1. Release.
2. Bargain and sale.
3. Confirmation.

And his heirs [*Parcels.*] [*Appurtenances*, 19.] [*Deeds*, 19.] *Habendum* to B. Bird in fee [*vid. sup.* 80. VI.]

Covenant by the heir and executors.

AND each of them, the said S. Simpson and M. Matthews, as such heir at law and executors respectively as aforesaid, &c. [severally covenant that they have done no act to incumber, 60. IX.]

V. By the cestuique trusts.

AND each of them, the said S. Simpson and H. Harris (4), as such intended cestuique trusts as aforesaid, severally, from the other of them, and as concerning only his and her own acts and defaults, and those of the said

J. Simpson, deceased, and to the extent only of his and her share or intended shares in the said purchase money under the hereinbefore recited will, doth hereby for himself and herself, and his and her heirs, covenant with the said B. Bird, his heirs and assigns, in manner following, — that is to say, [*usual covenants extending to the acts of the granting parties and testator* (*ut sup.* 94, 95. *as connected with* 20, 21.), *that they the said S. S. &c. or one of them, now have or hath in themselves, himself, or herself, a good right, &c. vid. sup.* 60.] In witness, &c.

(1) A naked authority, or as it more usually called, a power simply collateral, has been, after some critical remarks on Lord Hale's definition (*a*), defined by Mr. Sugden, to be a power to a person not having an interest in the lands, and to whom no estate is given, to dispose of or charge the estate in favour of some other person. (*b*) Hence a devise that the executors of testator shall sell his lands, exemplifies such a power. Its peculiar characteristic is, that unlike other powers it cannot be extinguished either by the donee or any other person; but continues to subsist notwithstanding a fine, feoffment, or release. (*c*)

(2) In a transaction circumstanced like this, the concurrence of the heir is the one point to be regarded, as a will defectively executed, is, in fact, as to the realty, no will. (*d*) Even in *equity* it cannot be medium of putting the heir to his election (*e*), except in one case, and that (which has been at once generally disapproved of, and always acted on (*f*)) is, where a personal legacy is given to the heir with an *express condition* annexed to it; — he must make good the devise of the realty, or give up his legacy. (*g*)

(*a*) Hard. 415. (*b*) Powers, 48. 4 Ed.
(*c*) Co. Litt. 237. a. 265. b.
(*d*) 2 Ves. J. 666. 7 Ibid. 372. 8 Ibid. 492. (*e*) Ibid.
(*f*) 8 Ves. J. 481—492. (*g*) Boughton v. Boughton, 2 Ves. 12.

(3) The identity of the operative words in a bargain and sale by executors under a naked authority with the operative words in the bargain and sale of a *use*, renders it proper to caution the student against confounding these instruments. They have no resemblance, though they bear the same name. For besides that the former is the execution of a power, it passes the common-law estate. Hence two consequences follow, — first, that uses may be declared in it to third persons; — secondly, that it does not require enrolment. It is, however, believed, that where the bargain and sale under the naked power in a will is to pass *lands in possession*, it need not be attended with livery of seisin; for though the language of Littleton is, that "the executors may sell the tenements so devised to them, and put out the heir, and thereof make a *feoffment*, alienation, and estate, *by deed or without deed*, to them to whom the sale is made (*h*);" and Lord Coke's commentary on it seems to proceed on the supposition of the necessity of *a feoffment*;—in observing on the words in italics, his Lordship says, "and therefore if *by the custom* a man devises that a *reversion* or *other thing that lies in grant* shall be sold by the executors, they may sell the same *without deed*; for the vendee shall be in by the devisor, and not by the executors." (*i*) The authority for this position is 19 H. 6. which it is proper to mention, because Lord Coke previously remarks, "that what 'in Littleton's' time a man might do by custom, he may do by the statutes of 32 and 34 H. 8. generally." And it would be an unaccountable anomaly if an instrument with livery were required when the lands are in possession, while an instrument may be made without that which is the compensatory or substitutive ceremony, — viz, sealing and delivery when they are in remainder or reversion.

(4) Persons entitled to the money arising from the sale must enter into the usnal covenants for the title (*k*), except when such money is to be first applied in payment of debts (*l*), which are unpaid at the time of the sale. (*m*)

(*h*) Litt. s. 169.
(*i*) 1 Inst. 113. a.
(*k*) 3 Atk. 264.
(*l*) 3 Ves. 233. 504.
(*m*) The *reason* of the exception evidently requires this qualification.

PRECEDENT IX.

TO USES, ETC. IN WHICH THE ORIGINAL VENDOR AND A MORTGAGEE IN FEE CONCUR WITH A SUB-VENDOR;—A RENT-CHARGE AND AN EXECUTORY INTEREST ARE RELEASED, AND THE USES OF A FINE DECLARED.

THIS INDENTURE, &c.

I. Parties. Between R. Rogers, of, &c. of the first part, H. Hughes, of, &c. and M. his wife of the second part, J. Jones, of, &c. of the third part, widow, W. Hughes, of, &c. of the fourth part, R. Rumsey, of, &c. of the fifth part, S. Shelley, of, &c. of the sixth part, P. Plowden, of, &c. of the seventh part, and N. Newland, of, &c. of the eighth part.

II. Recitals. 1. Lease and release to uses. [*Lease and release in fee to W. Hughes, deceased, with uses to bar dower*, ut supra, 52. *but with a power of appointment, not only by deed, but* "by his last will or testament, or any codicil or codicils thereto, to be severally signed and published as therein mentioned."] (1)

2. Mortgage. [*Mortgage in fee by lease and release* (2), *from W. Hughes to R. Rogers*, ut supra, 53.]

3. Will. AND WHEREAS the said W. Hughes by his last will, bearing date on, &c., and duly executed and attested "in the presence of three witnesses, as required by law, for passing real estates, and also as required by the power contained in the hereinbefore first re-

3. For the title by vendors.

rears thereof: AND each of them, the said M. Mason and H. Hoare, to the value of one undivided moiety only of the said hereditaments hereinbefore described, doth hereby, for himself and his heirs, covenant with the said F. Farwell, his appointees, heirs, and assigns, that notwithstanding any thing made, done, or suffered, by the said M. Mason, or H. Hoare, or the said E. Emmet, J. Jones, deceased, J. Jacobs, party hereto, or E. his wife, or by the said J. Jacobs, deceased, except as hereinafter is excepted, they the said M. Mason and H. Hoare now have, &c. [*vid. supra*, 20. and 94—5.] In witness, &c.

(1) Another precedent of a surrender in the same instrument with the release is given, because it may with propriety assume the following form, in which it is apparently embodied with the conveyance of the fee. It is within my design to instance those varieties which arise from the taste of the draftsman, as well as those which are produced by different combinations of circumstances.

(2) It is usual to make the conuzee of a fine, and the demandant in a recovery, parties to the conveyance in which the uses are declared. Of course, however, it is not *necessary*, even when the uses of the deed depend on their seisin; for that is vested in them as the result of those fictitious suits in which they are the plaintiffs.

(3) Conveyancers of modern times advise us in recitals not to predicate the nature of the assurance, but to leave its operation to be inferred from its form; with the exception, however, of a lease and release.

(4) Partly for the reason given in a preceding note, partly from its intrinsic inaccuracy, I object to the usual mode of reciting a lease and release when the latter assurance is subordinate and auxiliary to an appointment in the same instrument. In the absence of proof to the contrary, it must be assumed that the ap-

pointment is valid; and, if so, the release by way of further assurance is not called into action; and in effect, therefore, is *not* a release. On the same assumption the bargain and sale is likewise precluded from operation. How incorrect it is, therefore, to affirm that the estate was assured *by indentures of lease, release, and appointment*, is abundantly clear.

Another mode of giving this recital, and far more accurate than the last mentioned one, is to shew that the lease is in one instrument, and the release and appointment in another — thus, "whereas by indenture of lease, and indenture of release and appointment." It is here observable, that as an indenture may operate simultaneously as a release and *assignment*, by the different assurances respectively referring to their appropriate interests, the principle on which this form of recital is objected to in respect to *appointments*, is inapplicable to *assignments*.

(5) With, however, this addition in the proviso for cesser, — viz. "on payment by the said J. Jacobs, his *heirs, executors, administrators, or assigns*, unto the said J. Jones, his *executors, administrators, or assigns*; because both the mortgagor and mortgagee are in the present instance dead.

(6) It is usual to add these words (in writing) in reciting a will of *realty*; but I have rejected them from *thence*, as being necessarily involved in the simple affirmation of a will; for a testamentary act is, in respect to freeholds, a total nullity, both at law and in equity, unless it is not only in writing, but attended by particular solemnities. But this reason is inapplicable to a will of *chattels*, which, still depending on the doctrines of the civil law, may be either written or nuncupative.

(7) As an administration or probate is void (and by consequence the title of a term which depends on it bad), if the court it is obtained from has no jurisdiction, it has become a common, and certainly a proper practice with conveyancers, to require the will to be proved, or the letters granted by the prerogative court, not only when there is reason to suspect that there are *bonâ notabilia* in different dioceses (*a*), but when, from the lapse of time, or from other causes, the vendor is unable to preclude, by satisfactory evidence, the danger of resorting to an inferior court. The metropolitan courts are generally styled, "*the Prerogative Court of the Archbishop of* [Canterbury, or York].

(*a*) See the doctrine of the ecclesiastical law with respect to *bonâ notabilia*, 4 Burn, E. L. tit. Probate.

(8) It was long since held, that the words "equally to be divided," would make a tenancy in common in a will (*b*), and, indeed, they have been determined to produce the same effect in a conveyance to uses. (*c*) It is now settled that the word "*equally*," alone, does in a will make a tenancy in common. (*d*) In consequence of the feudal policy which *gave construction a leaning in favour of joint-tenancies*, having ceased to operate, and that species of modification being for several reasons, but more especially on account of the *jus accrescendi*, or right of survivorship, less responsive to the wants, and less agreeable to the ideas of modern times, than a tenancy in common, the courts have struggled with, and, indeed, subverted the ancient principle, so far as to exclude it from devises.

(9) In a declaration of the uses of either a fine or recovery, the lands ought to be described with much minuteness and accuracy, as that description usually guides the jury.

(10) It may be observed, that although a fine is now, as a matter of course, levied with proclamations, they are not essential to the efficient transfer of the estate of a married woman. (*e*)

(11) The rules with respect to a direction or declaration of uses by baron and feme, are peculiar and deserving attention. It is true, generally, that a coincidence in their declarations is requisite to their validity (*f*): but this rule is qualified by a distinction between the estate and the land; a disagreement in the former, though partial only, being fatal; in the latter, vitiating the disposition of so much of the subject matter (so to express myself), as the disagreement comprises. (*g*) On this distinction another has been grafted. It has been contended, that the disagreement in the former case is fatal, only when it relates to the first uses declared (*h*), as those are the support of the rest; and by consequence, when void, necessarily draw them likewise to the ground. This argument is plausible; but it would not be completely tenable, had the principle on which it founds itself been that to which it is correctly referrible. For admitting the true ground of invalidating the conflicting declarations of baron and feme to be the privation of the support of the ulterior uses, still it would apply only to those cases in which they were dependent on the prior estate as *remainders*,

(*b*) 3 Rep. 39. 1 Vent. 216—227.
(*c*) 2 Ves. 252. 3 Atk. 734.
(*d*) Cro. Eliz. 695. 1 Vern. 32. Cowp. 657.
(*e*) 5 Cruise, Dig. 207. 2 Ed.
(*f*) 2 Rep. 58. a. Dyer, 146. b.
(*g*) 2 Co. 57, 58. Moor, 196.
(*h*) 1 Prest. Conv. 314.

time aforesaid, by the direction of the said S. Shelley, making with the said sum of £500 the aggregate sum of £4000, the consideration in the first recited contract, the receipt of which said sum of £3500, and the payment of which said sum of £500 to the said R. Rogers as aforesaid, the said H. Hughes doth hereby acknowledge, and from both of them respectively doth release the said S. Shelley and P. Plowden; and also in consideration of the further sum of £80 of sterling money to the said S. Shelley, at the time aforesaid, paid by the said P. Plowden, making, with the said sum of £4000, the aggregate sum of £4080, the full consideration agreed to be given by the said P. Plowden, for the purchase of the said hereditaments, and the fee-simple thereof, free from all incumbrances (except as hereinafter mentioned), the receipt of which said sum of £80, and also the payment of the said sum of £4000 as aforesaid, the said S. Shelley doth hereby acknowledge, and from both of them respectively doth hereby release the said P. Plowden, he, the said R. Rogers, as such mortgagee as aforesaid, at the request of the said H. Hughes, and with the approbation of the said S. Shelley, by these presents DOTH RELEASE, AND the said J. Jones, to the intent to extinguish his aforesaid rent-charge of £40, by these presents DOTH RELEASE, and the said W.

Of the residue.

IV. Operative part.

1. Conveyance of the legal estate.

2. Release of the rent-charge.

II. Recitals. Lloyd, of, &c. of the fifth part: WHEREAS J. Simpson, late of , &c. being seised in absolute fee-simple by purchase, for a valuable consideration, of the hereditaments hereinafter described, died on the day

1. Will. of , leaving an instrument in writing, purporting to be his last will, and bearing

Being a devise for life with a direction to the executor to sell after the death of tenant for life. date on the day , whereby he devised the said hereditaments to his then wife, L. Simpson, for her life, and after her death directed his executor to sell the same, either by public auction or private contract, for the best price that could be obtained for the same, and to divide such sum equally among such of his children as should be then living; and the said testator appointed the said M. Matthews executor of his said will, who duly proved the same, on the day

2. Defectively executed. of , in the court of : AND WHEREAS, by reason of the said will being executed in the presence of two witnesses only, the said hereditaments have descended to the said S. Simpson, the eldest son of the said testator, but he being desirous of effectuating the intention of his said father,

Agreement of the heir. hath agreed, as heir at law distinctly, to concur in the conveyance of the said hereditaments in the manner hereinafter

3. Death of tenant for life, appearing (2): AND WHEREAS the said L. Simpson enjoyed the said hereditaments during her life, and died in the month

leaving children. of, &c. leaving the said S. Simpson and H. Harris, the children of the said testator, her surviving: AND WHEREAS the said M. Matthews, as such executor as aforesaid, with the concurrence of the said S. Simpson as heir at law as aforesaid, and of him and the said H. Harris as such cestuique trusts of the said purchase money as aforesaid, shortly since contracted with the said B. Bird for the sale of the aforesaid hereditaments as hereinafter mentioned, for the price of £ , "to be conveyed to the said B. Bird in the manner hereinafter appearing:" NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of sterling money to the said M. Matthews, as such executor as aforesaid, by the direction of the said S. Simpson (as such heir at law as aforesaid), and also of the said S. Simpson and H. Harris (as such cestuique trusts as aforesaid), paid by the said B. Bird, immediately before the execution of these presents, in full for the absolute purchase of the said hereditaments hereinafter described, "and the fee-simple thereof" free from all incumbrances (except the land-tax), the receipt of which said sum of £ the said M. Matthews doth hereby acknowledge, and the payment whereof to him, they the said S. Simpson and H. Harris,

4. Contract by the executor.

III. Testatum.

Payment to the executor.

II. Recitals. Lloyd, of, &c. of the fifth part: WHEREAS J. Simpson, late of , &c. being seised in absolute fee-simple by purchase, for a valuable consideration, of the hereditaments hereinafter described, died on the day

1. Will. of , leaving an instrument in writing, purporting to be his last will, and bearing

Being a devise for life with a direction to the executor to sell after the death of tenant for life. date on the day , whereby he devised the said hereditaments to his then wife, L. Simpson, for her life, and after her death directed his executor to sell the same, either by public auction or private contract, for the best price that could be obtained for the same, and to divide such sum equally among such of his children as should be then living; and the said testator appointed the said M. Matthews executor of his said will, who duly proved the same, on the day

2. Defectively executed. of , in the court of : AND WHEREAS, by reason of the said will being executed in the presence of two witnesses only, the said hereditaments have descended to the said S. Simpson, the eldest son of the said testator, but he being desirous of effectuating the intention of his said father,

Agreement of the heir. hath agreed, as heir at law distinctly, to concur in the conveyance of the said hereditaments in the manner hereinafter

3. Death of tenant for life, appearing (2): AND WHEREAS the said L. Simpson enjoyed the said hereditaments during her life, and died in the month

leaving children. of, &c. leaving the said S. Simpson and H. Harris, the children of the said testator, her surviving: AND WHEREAS the said M. Matthews, as such executor as aforesaid, with the concurrence of the said S. Simpson as heir at law as aforesaid, and of him and the said H. Harris as such cestuique trusts of the said purchase money as aforesaid, shortly since contracted with the said B. Bird for the sale of the aforesaid hereditaments as hereinafter mentioned, for the price of £ , "to be conveyed to the said B. Bird in the manner hereinafter appearing:" NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of sterling money to the said M. Matthews, as such executor as aforesaid, by the direction of the said S. Simpson (as such heir at law as aforesaid), and also of the said S. Simpson and H. Harris (as such cestuique trusts as aforesaid), paid by the said B. Bird, immediately before the execution of these presents, in full for the absolute purchase of the said hereditaments hereinafter described, "and the fee-simple thereof" free from all incumbrances (except the land-tax), the receipt of which said sum of £ the said M. Matthews doth hereby acknowledge, and the payment whereof to him, they the said S. Simpson and H. Harris,

4. Contract by the executor.

III. Testatum.

Payment to the executor.

"the former as such heir at law, and both of them as such cestuique trusts as aforesaid," do hereby admit, and from the same sum, they and the said M. Matthews do hereby release the said B. Bird, he the said S. Simpson, as such heir at law as aforesaid, and also as one of the cestuique trusts under the hereinbefore recited will, by these presents DOTH RELEASE, and the said M. Matthews, as such executor as aforesaid, and in exercise of the power contained in the same will, by these presents DOTH BARGAIN AND SELL (3), and the said H. Harris, as such other cestuique trust as aforesaid, by these presents DOTH CONFIRM unto the said B. Bird (in his, &c. [*supra*, 18, the bargainor S. Simpson, alone]).

IV. Operative part.
1. Release.
2. Bargain and sale.
3. Confirmation.

And his heirs [*Parcels.*] [*Appurtenances*, 19.] [*Deeds*, 19.] *Habendum* to B. Bird in fee [*vid. sup.* 80. VI.]

Covenant by the heir and executors.

AND each of them, the said S. Simpson and M. Matthews, as such heir at law and executors respectively as aforesaid, &c. [severally covenant that they have done no act to incumber, 60. IX.]

V. By the cestuique trusts.

AND each of them, the said S. Simpson and H. Harris (4), as such intended cestuique trusts as aforesaid, severally, from the other of them, and as concerning only his and her own acts and defaults, and those of the said

J. Simpson, deceased, and to the extent only of his and her share or intended shares in the said purchase money under the hereinbefore recited will, doth hereby for himself and herself, and his and her heirs, covenant with the said B. Bird, his heirs and assigns, in manner following, — that is to say, [*usual covenants extending to the acts of the granting parties and testator* (*ut sup.* 94, 95. *as connected with* 20, 21.), *that they the said S. S. &c. or one of them, now have or hath in themselves, himself, or herself, a good right, &c. vid. sup.* 60.] In witness, &c.

(1) A naked authority, or as it more usually called, a power simply collateral, has been, after some critical remarks on Lord Hale's definition (*a*), defined by Mr. Sugden, to be a power to a person not having an interest in the lands, and to whom no estate is given, to dispose of or charge the estate in favour of some other person. (*b*) Hence a devise that the executors of testator shall sell his lands, exemplifies such a power. Its peculiar characteristic is, that unlike other powers it cannot be extinguished either by the donee or any other person; but continues to subsist notwithstanding a fine, feoffment, or release. (*c*)

(2) In a transaction circumstanced like this, the concurrence of the heir is the one point to be regarded, as a will defectively executed, is, in fact, as to the realty, no will. (*d*) Even in *equity* it cannot be medium of putting the heir to his election (*e*), except in one case, and that (which has been at once generally disapproved of, and always acted on (*f*)) is, where a personal legacy is given to the heir with an *express condition* annexed to it; — he must make good the devise of the realty, or give up his legacy. (*g*)

(*a*) Hard. 415. (*b*) Powers, 48. 4 Ed.
(*c*) Co. Litt. 237. a. 265. b.
(*d*) 2 Ves. J. 666. 7 Ibid. 372. 8 Ibid. 492. (*e*) Ibid.
(*f*) 8 Ves. J. 481—492. (*g*) Boughton v. Boughton, 2 Ves. 12.

(3) The identity of the operative words in a bargain and sale by executors under a naked authority with the operative words in the bargain and sale of a *use*, renders it proper to caution the student against confounding these instruments. They have no resemblance, though they bear the same name. For besides that the former is the execution of a power, it passes the common-law estate. Hence two consequences follow, — first, that uses may be declared in it to third persons; — secondly, that it does not require enrolment. It is, however, believed, that where the bargain and sale under the naked power in a will is to pass *lands in possession*, it need not be attended with livery of seisin; for though the language of Littleton is, that "the executors may sell the tenements so devised to them, and put out the heir, and thereof make a *feoffment*, alienation, and estate, *by deed or without deed*, to them to whom the sale is made (*h*);" and Lord Coke's commentary on it seems to proceed on the supposition of the necessity of *a feoffment*;—in observing on the words in italics, his Lordship says, "and therefore if *by the custom* a man devises that a *reversion* or *other thing that lies in grant* shall be sold by the executors, they may sell the same *without deed*; for the vendee shall be in by the devisor, and not by the executors." (*i*) The authority for this position is 19 H. 6. which it is proper to mention, because Lord Coke previously remarks, "that what 'in Littleton's' time a man might do by custom, he may do by the statutes of 32 and 34 H. 8. generally." And it would be an unaccountable anomaly if an instrument with livery were required when the lands are in possession, while an instrument may be made without that which is the compensatory or substitutive ceremony, — viz, sealing and delivery when they are in remainder or reversion.

(4) Persons entitled to the money arising from the sale must enter into the usnal covenants for the title (*k*), except when such money is to be first applied in payment of debts (*l*), which are unpaid at the time of the sale. (*m*)

(*h*) Litt. s. 169.
(*i*) 1 Inst. 113. a.
(*k*) 3 Atk. 264.
(*l*) 3 Ves. 233. 504.
(*m*) The *reason* of the exception evidently requires this qualification.

PRECEDENT IX.

TO USES, ETC. IN WHICH THE ORIGINAL VENDOR AND A MORTGAGEE IN FEE CONCUR WITH A SUB-VENDOR;—A RENT-CHARGE AND AN EXECUTORY INTEREST ARE RELEASED, AND THE USES OF A FINE DECLARED.

THIS INDENTURE, &c.

I. Parties. Between R. Rogers, of, &c. of the first part, H. Hughes, of, &c. and M. his wife of the second part, J. Jones, of, &c. of the third part, widow, W. Hughes, of, &c. of the fourth part, R. Rumsey, of, &c. of the fifth part, S. Shelley, of, &c. of the sixth part, P. Plowden, of, &c. of the seventh part, and N. Newland, of, &c. of the eighth part.

II. Recitals. 1. Lease and release to uses. [*Lease and release in fee to W. Hughes, deceased, with uses to bar dower*, ut supra, 52. *but with a power of appointment, not only by deed, but* "by his last will or testament, or any codicil or codicils thereto, to be severally signed and published as therein mentioned."](1)

2. Mortgage. [*Mortgage in fee by lease and release* (2), *from W. Hughes to R. Rogers*, ut supra, 53.]

3. Will. AND WHEREAS the said W. Hughes by his last will, bearing date on, &c., and duly executed and attested "in the presence of three witnesses, as required by law, for passing real estates, and also as required by the power contained in the hereinbefore first re-

placed to the credit of the said cause, subject
7. Sale accordingly. to the further order of the said court: AND WHEREAS, in pursuance of the said decree or order, the hereditaments hereinafter described were, on the day of , 1818, offered for sale by public auction with the approbation of the said master, at the , in several lots, according to certain printed particulars produced at the time of such sale, at which sale the said V. Villers was declared to be the highest bidder and purchaser
8. Further report. thereof, at the sum of £ : AND WHEREAS, by a further report of the said master, made in the said cause, and bearing date on the day of , the said V. Villiers was reported to be the purchaser of the said hereditaments, and the said report stands
Confirmed. absolutely confirmed by an order of the court bearing date the day of :
9. Further order. AND WHEREAS, by an order of the said court bearing date on the day of , the said V. Villers, who by his counsel admitted that he was satisfied with the title to the said hereditaments, was directed to pay his purchase-money into the bank of England, with the privity of the accountant general of the said court, to be placed to the credit of the said cause on or before the
10. Payment of the purchase money day of : AND WHEREAS the said V. Villers, in pursuance of the last mentioned order, did, on the day of , pay

into the bank of England. the sum of £ into the bank of England with the privity of the said accountant general, and he has obtained for the said sum the receipt of , one of the cashiers of the said bank, and likewise a certificate of the payment thereof under the hand of the said accountant general, * and the said certificate and receipt have been duly filed in the office of the register of the said court

III. Testatum. of chancery: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £ of, &c. paid as aforesaid by the said V. Villers, the payment and application of which said sum in manner aforesaid, they the said F. Furr and S. Stock do hereby respectively acknowledge, and therefrom release the said V. Villers, they the said F. Furr and S. Stock, according to their several interests in the said premises, in execution of the trusts reposed in them by the hereinbefore recited will, and in pursuance

IV. Operative part. of the said recited decree or decretal order, by these presents DO GRANT AND RELEASE to the said V. Villers [*bargain and sale, from both granting parties*, 59—18.] and his heirs all [*Parcels.*] [*Appurtenances*, 19.] [*Deeds*, 19.] [*Habendum to V. Villers in fee*, 80.] [*Covenant by F. Furr and S. Stock, that they have done no act to incumber*, 60. IX.] In witness, &c.

* *See the nature of this officer*, 2 *Madd.* 581. 2*d Ed.*

in consideration whereof the said W. Hughes hath agreed to concur in these presents, and in a fine *sur conuzance de droit come ceo* of the said hereditaments, for the purpose, and in the manner hereinafter appearing: AND WHEREAS, the other lands devised in the before recited will, exclusive of those which are hereinafter described, are of ample value for payment of the said unpaid legacies, and, therefore, the said P. Plowden has agreed to accept an indemnity out of such lands against the same legacies, to be given immediately after the execution of these presents: NOW THIS INDENTURE WITNESSETH, that in performance of the recited agreement, and in consideration of the said sum of £500 of sterling money (part of the said first mentioned purchase-money of £4000), to the said R. Rogers, paid by the said P. Plowden, immediately before the execution of these presents, by the direction of the said H. Hughes and S. Shelley, respectively, in discharge of all principal money and interest due to him as aforesaid, the receipt of which said sum the said R. Rogers doth hereby acknowledge, and therefrom release the said P. Plowden, and also the said H. Hughes and S. Shelley, and also in consideration of the sum of £3500 of sterling money, residue of the said first mentioned purchase money, to the said H. Hughes paid by the said P. Plowden at the

13. With the purchaser for an indemnity against the legacies.

III. Testatum.

Payment of the mortgage-money.

Of the original purchase money.

time aforesaid, by the direction of the said S. Shelley, making with the said sum of £500 the aggregate sum of £4000, the consideration in the first recited contract, the receipt of which said sum of £3500, and the payment of which said sum of £500 to the said R. Rogers as aforesaid, the said H. Hughes doth hereby acknowledge, and from both of them respectively doth release the said S. Shelley and P. Plowden; and also in consideration of the further sum of £80 of sterling money to the said S. Shelley, at the time aforesaid, paid by the said P. Plowden, making, with the said sum of £4000, the aggregate sum of £4080, the full consideration agreed to be given by the said P. Plowden, for the purchase of the said hereditaments, and the fee-simple thereof, free from all incumbrances (except as hereinafter mentioned), the receipt of which said sum of £80, and also the payment of the said sum of £4000 as aforesaid, the said S. Shelley doth hereby acknowledge, and from both of them respectively doth hereby release the said P. Plowden, he, the said R. Rogers, as such mortgagee as aforesaid, at the request of the said H. Hughes, and with the approbation of the said S. Shelley, by these presents DOTH RELEASE, AND the said J. Jones, to the intent to extinguish his aforesaid rent-charge of £40, by these presents DOTH RELEASE, and the said W.

Of the residue.

IV. Operative part.

1. Conveyance of the legal estate.

2. Release of the rent-charge.

3. Of the executory interest.

Hughes, to the intent to extinguish his executory interest under the hereinbefore recited will, by these presents DOTH RELEASE (8),

4. Confirmation and release.

and the said H. Hughes and S. Shelley by these presents DO respectively RELEASE AND CONFIRM unto the said P. Plowden, [*bargain and sale between R. Rogers and H. Hughes, of the one part, and P. Plowden, of the other part*, 18.] and his heirs. [*Parcels.*] [*Appurtenances*, 19.] [*Deeds*, 19.] [*Habendum to P. Plowden, in fee to uses, to prevent dower*, ut supra, 19.]

V. Recitals.

AND WHEREAS, in further performance of

1. Fine levied.

the above recited agreement, and for the considerations hereinbefore expressed, the said H. Hughes and M. his wife have, in or as of term last, levied to the said R. Rumsey, and his heirs, a fine *sur conuzance de droit come ceo* of (*inter alia*) the hereditaments hereinbefore released, by the description therein con-

2. No uses declared.

tained: AND WHEREAS no uses have been declared of the said fine so far as relates to the hereditaments hereby released, "and the said R. Rumsey hath agreed, at the request of the said H. Hughes, and his said wife, to concur with them in these presents,

VI. Further testatum.

to declare the uses of the said fine." Now, THEREFORE, THIS INDENTURE FURTHER WITNESSETH, that it is hereby declared by

Declaration of the use of the fine.

the said parties to these presents, so far as they are respectively interested in the pre-

mises, and particularly by the said H. Hughes and his said wife, "and the said R. Rumsey (9)," that the said fine, &c. *ut sup.* 103. VII.]

Covenant by mortgagee, &c.

[*Covenant by R. Rogers, J. Jones, W. Hughes, "and R. Rumsey," with P. Plowden, that they have done no act to incumber*, sup. 60. IX.]

Covenants for the title.

AND each of them, the said H. Hughes and S. Shelley, for himself and his heirs, doth hereby covenant with the said P. Plowden, his heirs, appointees, and assigns, in manner following, that is to say, that notwithstanding any thing made, done, or suffered, by the said R. Rogers, H. Hughes and M. his wife, S. Shelley, J. Jones, and W. Hughes, party hereto, or by any of them, or by the said W. Hughes, deceased, they the said granting parties, some or one of them have or hath, good right, &c. [20—60. *But add to the general form of the covenant for freedom from incumbrances*, particularly from all the legacies hereinbefore referred to, or so many or such parts thereof as now remain unpaid (10), *but excepting from the covenant* the land-tax, or annual sum of £ , payable in respect of the said hereditaments.] (11) In witness, &c.

(1) This part of the power may, however, be omitted from the recital with propriety, even when the will of the donee expressly adverts to it, when it is perfectly clear that the will operates on the seisin. And in conformity to the principle established in Sir Edward Clere's case (*a*), that a general disposition will not dispose of what

(*a*) 6 Rep. 17. b. Cro. Eliz. 877. Cro. Jac. 31.

the party has only a *power* over, unless it is necessary to satisfy the words of the disposition; a power has been held to be executed under a will, only in those cases where the words of the will cannot be satisfied without its operating as an appointment, or where there is some description of, or allusion to, the property which is the subject of the power. (*b*) But the mere allusion to the power, as in the will presently recited, does not convert the devise to an appointment.

It may be observed here, that it has been recently held, that the will of the donee of a power devising freeholds and copyholds, without any reference to the power, may, as to the freeholds, be a devise, if capable of enuring as such, and as to the copyholds be an appointment, if incapable of passing them in any other way. (*c*)

(2) If a person holding under the ordinary limitations of a modern purchase deed, mortgages, as in the present instance, by lease and release, instead of by appointment and release, the effect is nearly the same, as there the power would, *at least*, be exhausted by a legal execution; whereas, here it is virtually extinguished *at law* by the alienation of the whole estate to which it was annexed. (*d*) This circumstance deprives the words in inverted commas of the slightest importance.

(3) I have observed in the preceding note, that such an allusion to the power cannot give to the will the operation of an appointment: for when made in this manner, it is evidently not a manifestation of intent to produce that effect, but only to guard against the instrument's being invalid, from the possibility of its being construed an appointment.

(4) In a late case, in which a testator devised to his wife for life, remainder to his sons in fee, "but subject to and charged with the payment of a yearly rent or sum" to A. for life; it was most preposterously contended, that because the will gave no power of distress, it was a mere personal charge, and not a rent-seek, distrainable for under 4 G. 2. c. 28.; but it was, of course, held a direct charge on the land. (*e*)

(5) The limitation to W. Hughes is an executory devise, for it must enure either as such or as a remainder, and it cannot be the latter, because as the words introducing it are not expressive of a

(*b*) 2 Bro. R. 207. 3 Ves. 467. 7 Ves. 391., very strongly confirmed by the late case of Dean d. Nowell v. Roake, (in error) 5 Bar. & Cres. 720.

(*c*) Lewis v. Llewellyn, 1 Turner, 104., grounding itself on Standen v. Standen, 2 Ves. J. 589.

(*d*) 3 Vin. Abr. 432, pl. 10. (*e*) Buttery v. Robinson, 3 Bingh. 392.

general failure of issue, but of a failure of issue before a particular event, viz. the payment of the legacies, the previous limitation to H. Hughes and his heirs is not diminished to an estate tail. (*f*) And it is a valid executory devise, because the event on which it is limited to arise, is one which must happen, if at all, within the period allowed by the law for throwing property into that inalienable state (*g*), which is the invariable result of an executory devise (*h*), except when the antecedent limitation is an estate tail. (*i*)

(6) The *annexation* of the codicil to the will has ceased to be a material circumstance. It was so formerly, because it was relied on, as being a mean of bringing down the will to its own date in the absence of a positive indication of intention. (*k*) But at the present day, a codicil has *per se* the same operation, without annexation that it once had with it. (*l*)

(7) The effect of a contract for sale by one who is himself a contractee for sale, is to make the sub-vendor a trustee of his equitable interest for the sub-vendee. Lord Eldon has thus explained this doctrine. "If G. & W. (the sub-vendors) sold the estate to A. B., he would have a right to insist that they should convey to him such title as they had. So insisting, he claims no more than they would be entitled to do, if they had not sold their equitable interest; their vendee acquires the same right which they had, *i. e.* a right to call on the original vendor indemnifying them against all costs (*m*) for the use of their names, to enable them to execute the sub-contract by which they have undertaken to transfer their rights under the primary contract." (*n*) Perhaps, therefore, we may consider that in this case strict principle has been relinquished, and that it somewhat breaks the analogy between the operation of a contract on an equitable interest, and that of a conveyance on legal estates. For if a person seised of a legal estate beneficially, contracts to sell, he originates an equitable interest in the vendee, and *completely* transfers

(*f*) 2 Bos. & Pull. 324. 2 Barn. & Ald. 441. (*g*) For. 232.
(*h*) Cro. Ja. 590. (*i*) 1 Ld. Raym. 523. 1 Salk. 232.
(*k*) Attorney General v. Downing, Amb. 571.
(*l*) Barnes v. Crowe, 1 Ves. J. 486. 4 Bro. R. 2. Piggott v. Waller, 7 Ves. 98. Goodtitle v. Meredith, 2 Maule & Selw. 5.
(*m*) It is believed that his Lordship expressly said, what may, indeed, be inferred from the language of the report, that the second purchaser is bound to give the first an indemnity against any costs incurred in proceedings for his benefit, *without entering into a covenant for that purpose.* 12 Feb. 1818.—MSS.
(*n*) Wood v. Griffith, 1 Swanst. 56. The writer has taken the liberty of a little abridging his Lordship's language.

the usufruct to him; whereas, the effect of a contract is, on grounds of general convenience, somewhat straightened when the vendor has nothing but the usufruct. The conclusion adverted to is, however, perfectly consistent with what equity has done in other cases; for a contract by one who is a cestuique trust, or who has mortgaged in fee, is in the same predicament with that of a sub-vendor; and there has never been a doubt that a mortgagor or cestuique trust is a trustee of his equitable interest for the vendee. On the whole, however, we must consider the result as qualified and peculiar. For a contract by any one who has only an equitable interest, however that interest may arise, is clearly a complete revocation of a prior devise.

(8) The release of W. Hughes operates by extinguishment. No executory interest, whether future use, executory devise (*o*), or contingent remainder (*p*), is grantable by any common law assurance (*q*), or conveyance derived from the statute of uses. (*r*) The only mode of transferring it to a stranger or (who is in the same situation) a person who has not a vested freehold estate in the premises is, by matter of record, which works an estoppel on the grantee, and those claiming under him. On this point, however, there are some nice distinctions which we cannot here notice. (*s*) It suffices to observe, that the release by extinguishment, which, when made by one who has a mere right, cannot act without a freehold in the releasee (*t*), is the only conveyance by matter in pais, which, in any shape, transfers an executory interest.

(9) It is usual to make the conuzee join in declaring the uses; but in strictness of principle it is as absurd as it would be to make a feoffee or releasee to uses to do so. The practical object, however, is to preclude the possibility of a conclusion, that the fine was levied to the conuzee as a beneficial taker. But his execution of the deed is as complete a negative of that presumption, as his expressly concurring in the declaration of the uses.

(10) We may notice that these legacies are incumbrances, and affect the lands in the possession of the purchaser, because they are in the nature of specified or scheduled debts (*u*); and when a person devises his lands charged with the payment of his debts, and they are specified, a purchaser or mortgagee is bound

(*o*) 10 Rep. 50. 4 Rep. 66. b. 1 Inst. 266. a. (*p*) Fearnè, 366.
(*q*) Ibid. (*r*) Vid. 1 Sand. Uses, 108.
(*s*) The author has endeavoured to define them in the Essay on Remainders, 224.
(*t*) Litt. 447. Co. Litt. 265. b. 266. b. (*u*) 2 Cha. Ca. 221.

to see to the application of his money. (*v*) But debts have a priority to legacies. Hence a general charge of debts exempts a purchaser from any liability an account of the legacies. (*w*)

(11) It is a common, but, I believe, unauthorised practice (*x*), for the original vendor alone to covenant for the title.

PRECEDENT X.

BY DEVISEES IN TRUST FOR SALE IN PURSUANCE OF A DECREE OF THE COURT OF CHANCERY.

THIS INDENTURE made, &c.

I. Parties. between F. Furr, of, &c. and S. Stock, of, &c. of the one part, and V. Villers, of, &c.

II. Recitals. of the other part: WHEREAS, by indenture bearing date on the day of , 1808,

1. Feoffment in fee. and made between M. Morse, Esq. of the one part, and S. Stock, gentleman, since deceased, of the other part; and by livery of seisin (1), a memorandum whereof is indorsed on the same indenture, for the valuable considerations therein expressed, certain hereditaments hereinafter described were conveyed to and to the use of the said S.

2. Will. Stock and his heirs: AND WHEREAS the said S. Stock, being seised as aforesaid, did,

(*v*) Cha. Rep. 81. (*w*) Amb. 188.

(*x*) The ground of it is, that the liability of the sub-vendor on his covenants is balanced by no counter-liability in his favour. This argument, it is conceived, proves too much.

by his last will bearing date on the day of , 1819, and duly executed and attested, devise all his real estate to the said F. Furr and S. Stock (party hereto), and their heirs, upon trust to receive the rents and profits of his said hereditaments for the remainder of the leases thereof, and apply the same for the use of such children as he should leave, and after the expiration of the said leases, upon trust that they or the said trustees, or the survivor of them and his heirs, should, as soon as conveniently might be, sell the same hereditaments, &c. [*trust for sale, sup.* 78.]: AND WHEREAS the said testator died shortly after the date of his said will, without having altered or revoked it, leaving the said S. Stock (party hereto), his eldest son and heir at law; and the said will has been proved "by the executors thereof" in the court of : AND WHEREAS, (2) by a decree of the Master of the Rolls in the high court of Chancery on the day of , 1815, in a cause then and now depending therein, in which G. Gould and others, on the behalf of themselves and the other creditors of the said S. Stock, deceased, were plaintiffs, and the said F. Furr and S. Stock (party hereto) and others were defendants, it was declared, that the aforesaid will was well proved, and ought to be established, and the trusts thereof performed,

Devise to trustees on trust to receive the rents, &c.

and for sale.

3. Death of testator, &c.

4. Decree in equity.

Establishing the will.

and that the said S. Stock, deceased, was a trader within the statutes relating to bankrupts, and it was ordered that it should be referred to the Master A. B. one of the masters of the said court, to take an an account of what was due to the aforesaid creditors, and that the said master should enquire, and state to the court, what real estates the said testator was seised of at the time of making his will and at his death:

Reference to the master.

5. Master's report. AND WHEREAS the said master, by his report, made in the said cause, in pursuance of the said decree, bearing date, &c. certified (among other things), that he found that the said testator was, at the time of his will, and at his death, seised of, or intitled to, among several real estates therein named, the hereditaments hereinafter described:

6. Decree ordering a sale. AND WHEREAS, by another decree made in the said court in the said cause on the day of , it was ordered, that the real estates of the said testator should be sold (3) with the approbation of the said creditors, to the best purchaser or purchasers that could be gotten for the same, to be allowed of by the said master; and it was also ordered, that all proper parties should join (4) in the said sale as the said master should direct, and that the monies to arise thereby should be paid into the bank with the privity of the accountant general of the said court, and

All proper parties to join,

and money to be paid into the bank.

deed. But the draughtsman must be competent to draw that inference.

(3) It is now settled, that a mortgagee may make a good title to a purchaser under the usual trust or power of sale, without the concurrence of the mortgagor. (*b*)

(4) It is desirable to apportion the price, that there may be a correspondence between this conveyance and the surrender. If the ad valorem duty for the purchase money of the copyholds, which may be affixed either to this instrument or the surrender (*c*), be put on the latter, the propriety of apportionment is more obvious.

(5) The reader will observe that the mortgagee's power of giving receipts was not recited; and that it was rendered unnecessary by this concurrence of the persons interested in the surplus money.

(6) The mortgagee took nothing more than an equitable right under this covenant. A surrender, alone, gives but an inchoate legal right. The admittance of the tenant is the requisite means of perfecting his legal title. (*d*)

(7) A copyholder may surrender in court by attorney without a special custom to warrant it (*e*); but not into the hands of two tenants; for such surrender, though in person, is not good but by special custom. (*f*) The attorney ought to pursue the usual form and surrender in the name of his principal. (*g*) A purchaser is not obliged to accept a surrender by attorney. (*h*)

It is observable that the Chancellor in Mitchell v. Neale, laid it down generally, that a surrender by attorney cannot be out of court, as that would be for an attorney to make an attorney. Lord Coke also emphatically says, in his treatise on copyholds (*i*), "that *such* a surrender *must* be in person. It seems, however (and by his Lordship's own Reports), that *such* a surrender by *attorney* may be warranted by *special custom*. (*k*)

(8) The great advantage of accompanying a copyhold surrender by a deed of covenant to surrender is, that the purchaser may obtain covenants for the title.

(*b*) Corder v. Morgan, 18 Ves. 344.

(*c*) When the surrender is made *in* court, the ad valorem duty is on the copy of court roll. Vid. 55 G. 3 c. 184. Sched. tit. Conveyance.

(*d*) Vid. 2. Bl. Comm. 368.

(*e*) Co. Copy. s. 34. Combe's case, 9 Rep. 75.

(*f*) 9 Rep. 76. a. (*g*) Ibid.

(*h*) Mitchell v. Neale, 2 Ves. 679. (*i*) S. 34. 92.

(*k*) See Combe's case, 9 Rep. 77.

(9) This covenant is evidently in every way correlative to the covenant for a seisin in fee of freeholds, and may therefore be omitted as involved in the covenant for a right to surrender. (*l*)

PRECEDENT XII.

OF FREEHOLDS AND ASSIGNMENT OF LEASEHOLDS IN CONSIDERATION OF AN ANNUITY GRANTED BY ANOTHER DEED.

THIS INDENTURE made, &c.

I Parties. between L. Ling, of, &c. of the one part, and H. Howe, of, &c. of the other part:

II. Recitals. WHEREAS the said L. Ling is seised in absolute fee-simple by purchase for a valuable consideration of the freehold hereditaments hereinafter described:

1. Seisin of the freeholds.

2. Lease for

AND WHEREAS, by an indenture bearing date on the day of , and made between B. Butts of the one part, and H. Hume of the other part, for the considerations therein expressed, certain hereditaments, and among them the hereditaments hereinafter described, were demised to the said H. Hume from the day of then past, for the term of

(*l*) Vid. sup. 44. (44.)

VI. Habendum of the leaseholds. [Appurtenances, 19.]: TO HAVE AND TO HOLD the said leasehold premises hereby assigned to the said H. Howe, "his executors, administrators, and assigns," for the residue of the said term of 99 years, subject to the payment of the rent, and performance of the covenants, conditions, and agreements, which are on the part of the lessor, his executors, administrators, and assigns, to be paid and performed; and also subject to the agreement under which the said rent has been apportioned, and only £3 a year, part thereof, is paid for the said leasehold premises:

VII. Covenants for the title. AND the said L. Ling doth hereby, for himself and his heirs, covenant with the said H. Howe, his heirs, executors, administrators, and assigns (5), that notwithstanding any

1. That the lease is valid, thing made, done, or suffered, by the said L. Ling (except as hereinafter is excepted), "the aforesaid indenture of the day of , is, at the time of the execution of these presents, a valid and subsisting lease for the premises hereinbefore assigned, for the residue of the said term of 99 years therein: AND that notwithstanding any such thing as aforesaid (except as aforesaid)," the said L. Ling hath good right to release and assign the said freehold and leasehold premises

and that the vendor has good right to release and assign. hereinbefore described "to the use of the said H. Howe, his heirs, executors, administrators, and assigns, respectively," in manner

aforesaid, and according to the intent of these presents: AND FURTHER, that the said H. Howe shall at all times hereafter peaceably enjoy, "and take the rents and profits of," the same freehold and leasehold premises, "during the respective estates for which they are hereby released and assigned respectively, and" according to the intent of these presents, without any interruption or denial from the said L. Ling, or any person rightfully claiming any interest at law or in equity in the same premises respectively, or any part thereof, from, under, or in trust for him (except as aforesaid): AND THAT free from all "grants, assignments, forfeitures," titles, troubles, charges, and incumbrances whatever, heretofore committed, omitted, or privily suffered, by the said L. Ling, or any person lawfully or equitably claiming the said hereditaments, hereby released and assigned respectively, from, under, or in trust for the said L. Ling, except "as to the said leasehold premises," the rents, covenants, provisoes, and agreements in the said indenture of lease of day of contained, and which, henceforth, on the tenant's part, ought to be paid and observed: AND MOREOVER, that he, the said L. Ling, and every person lawfully or equitably claiming any interest in the said freehold and leasehold hereditaments respectively, from, under, or

2. For quiet enjoyment.

3. Freedom from incumbrances.

Exceptions.

4. For further assurance.

in trust for him, shall at all times hereafter on every reasonable request, and at the costs in all things of the said H. Howe, his heirs, executors, administrators, or assigns, respectively, make or do, or cause to be made or done, all such further lawful and reasonable acts and assurances, of record or not of record, for more effectually assuring as well the said freehold hereditaments, to and to the use of the said H. Howe and his heirs, &c. as the said leasehold premises, during the then residue of the said term of 99 years, to the said H. Howe, his executors, administrators, and assigns, in manner aforesaid, and according to the intent of these presents, as by the said H. Howe, his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be lawfully and reasonably advised and required, [*so as, &c. supra*, 22.] (6)

(1) Were the vendor to die before the conveyance is executed, the purchaser would still be intitled to a specific performance of his contract, though by the vendor's death the annuity has ceased, and the consideration has consequently failed. (*a*) For this case falls within the rule of equity, — that what is agreed to be done, is considered as actually performed. But the purchaser could not insist upon a specific performance, if the annuity were to become due before the vendor's death, and he were to neglect to pay or tender it (*b*); for he has then by laches forfeited his right to the aid of a court of equity. Hence, when that is the intention, the agree-

(*a*) 1 Bro. C. C. 156. 1 Price, 292. 9 Ves. J. 246.
(*b*) 7 Bro. P. C. 184.

ment should expressly entitle the purchaser to a conveyance on payment of the annuity up to the death of the vendor, although that event happens before the contract is completed, and a payment of the annuity, having become due, shall not have been made or tendered. (*c*)

It may be observed, that the deed securing an annuity never requires enrolment when the consideration is, as in the present instance, an estate in land. (*d*)

(2) It has long been a general practice for a debtor to execute, as an auxiliary security, a warrant of attorney addressed to one or more attorneys of some court at Westminster, authorising him or them to acknowledge a judgment for the money; which enables the creditor to sue out an *elegit*, in the same manner as if the judgment had been obtained in an adversary suit (*e*); — the warrant being merely to shorten the process, and lessen the expence of the proceedings. (*f*)

It is also observable, that when one sells an estate for an annuity without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him. (*g*)

(3) It is a common practice to describe the parcels of an assignment in the recital of the instrument creating the term. In this instance they are introduced into the operative part. The difference is immaterial. But when the parcels are described by reference to the lease, particular care must be taken that the reference is correct: an error would be fatal. (*h*)

(4) In the absence, however, of any stipulation or express grant, common fixtures would pass to the purchaser. (*i*) M. Sugden, speaking with reference to contracts, observes, that it is proper to make some provision as to articles not properly fixtures. (*k*) Lord Hardwicke has said, that if a man sell a house where there is a copper,

(*c*) See Sugd. Vend. 257—8. 7 Ed.

(*d*) James v. James, 2 Brod. and B. 702. 5 Moore, 479. Harrison v. Smitheringale, 5 Moore, 481.

(*e*) The statute 3 G. 4. c. 39. has enacted some new regulations respecting warrants of attorney; and now unless the warrant or a copy thereof, &c. be filed by the holder with the clerk of the dockets within 21 days after execution, or unless judgment shall have been signed, or execution issued out on such warrant within that period, it is void against the assignees of any commission of bankrupts which shall be issued after the expiration of that term.

(*f*) See Doe v. Carter, 8 T. R. 57. Sampson v. Goode, 2 Bar. and Ald. 568.

(*g*) 2 Anstr. 550.

(*h*) Touchs. 77. Sup. 63. n. (4.)

(*i*) 2 Bar. and Cres. 76.

(*k*) Vend. 32.

or a brew-house where there are utensils, unless some consideration was given for them, and a valuation set upon them, they would not pass. (*l*) As in the present instance, by an express grant of the fixtures, those articles which are not legally comprehended under that denomination, may be assumed to be intended not to pass; — the clause may be continued thus,—and all the other appurtenances to the said leasehold hereditaments, except such articles as are not proper fixtures.

(5) The express nomination of the executors, &c. in order to make the covenants for the title of the leaseholds run with the land, is as unnecessary as the express nomination of the heirs, &c. has been observed to be (*m*), and for the same reason. But some practices we must still continue, out of complaisance to the timidity of ignorance.

(6) The reader will observe, that the purchaser is not made to indemnify the vendor against the rents and covenants in the lease, because the latter is only an assignee of the leasehold estate; and (*ex hypothesi*) not being bound by *covenant* to pay the rent and perform the covenants in the lease, there is not any thing for the purchaser to indemnify against. A question, however, has been raised, whether an assignee is bound to indemnify his assignor against the rents and covenants under an implied contract. (*n*)

(*l*) 1 Atk. 478.
(*m*) Sup. 44.
(*n*) Vid. Sugd. Vend. 33.

PRECEDENT XIII

TO A CORPORATION AGGREGATE, WITH THE CONCURRENCE OF A MORTGAGEE FOR YEARS, WHO SURRENDERS HIS TERM FOR THE PURPOSE OF MERGER, AND JOINS IN THE CONVEYANCE OF THE FEE IN ORDER TO OBVIATE A DOUBT WHETHER HE HAS THE LEGAL INHERITANCE.

THIS INDENTURE, &c.

I. Parties. between H. Haines, of, &c. of the first part, L. Lamb, of, &c. of the second part, and the mayor, aldermen, and burgesses of the borough of , in the county of , of the third part: WHEREAS (1)

II. Recitals. 1. Seisin of vendor, the said H. Haines being at the time of the date and execution of the indenture hereinafter recited, seised in absolute fee-simple by purchase for a valuable consideration of, among other hereditaments, the hereditaments hereinafter described, by an indenture bearing date on

and mortgage by demise. or about the day of , and expressed to be made between himself and the said L. Lamb, demised, among other premises, the same hereditaments to the said L. Lamb from the date of the said indenture for the term of 1000 years, subject to a proviso for cesser, on payment by the said H. Haines to the said L. Lamb of the principal sum of £1000, with lawful interest for the same, at

the time and place therein mentioned for payment thereof: AND WHEREAS the said principal money is now due to the said L. Lamb upon his said security, but all interest in respect thereof has been satisfied, "as is hereby acknowledged:" AND WHEREAS the said H. Haines hath contracted with the said mayor, aldermen, and burgesses for the sale as hereinafter mentioned, of the hereditaments hereafter described, with their appurtenances, for the sum of £500, which it has been agreed to apply in reduction of the said sum of £1000, in consideration whereof the said L. Lamb has agreed to discharge the same hereditaments from the residue of the said sum of £1000 and its interest: AND WHEREAS the said mayor, aldermen, and burgesses, have requested that the residue of the said term, so far as it comprises the said purchased hereditaments, may be surrendered so as to be merged, and because it may be doubted whether the legal fee is not vested in the said L. Lamb, he has agreed to join in the conveyance of the inheritance in the manner hereinafter expressed: AND WHEREAS the said mayor, aldermen, and burgesses, have obtained his majesty's licence bearing date on the day of , to purchase and hold the hereditaments hereinafter described in fee-simple, without forfeiting them under the statutes of

2. Money due.

3. Contract for sale.

Agreement of mortgagee.

4. Request to merge the term.

Further agreement of mortgagee.

5. Licence to hold in mortmain.

IV. Testatum. mortmain in that behalf (2): NOW THIS INDENTURE WITNESSETH, that in pursuance

Consideration. of the said agreement, and in consideration of £500 of lawful money of Great Britain to the said L. Lamb paid by the said mayor, aldermen, and burgesses, at or before the execution of these presents, at the instance of the said H. Haines, in part payment of

Mortgage money. the said sum of £1000, so due to the said L. Lamb on the said recited indenture, and in full for the absolute purchase of the hereditaments hereinafter described, discharged from the residue of the said sum of £1000 and its interest, the payment of which said sum of £500 the said H. Haines, and the receipt of which said sum of £500 the said L. Lamb do hereby acknowledge, and from the same respectively release the

IV. Operative part. 1. Release. said mayor, aldermen, and burgesses, the said L. Lamb, by the direction of the said H. Haines (3), by these presents DOTH release, and the said H. Haines by these pre-

2. Grant, release and confirmation. sents DOTH (4) grant, release, and confirm, and the said L. Lamb, for the purpose of merging the said term of 1000 years in the said purchased hereditaments, by these pre-

3. Surrender. sents, DOTH surrender to the said mayor, aldermen, and burgesses (5) [Bargain and sale (6), 18—59. Bargainors, Mortgagee, and Mort-

Parcels. gagor], "and their successors" [Parcels].

V. Habendum. [Appurtenances, 19.] [Deeds, ibid.]; To HAVE AND TO HOLD the said hereditaments hereinbefore described, with their appurtenances, to and to the use of the said mayor, aldermen, and burgesses, "and their successors" [*Covenant by L. Lamb, that he has done no act to incumber*, 61. XV.] [*Covenants for the title by H. Haines with the mayor, aldermen, and burgesses*, "their successors and assigns" (7), *sup.* 20.]. In witness, &c.

Covenants.

(1) This mode of blending the recital of the vendor's seisin with that of the mortgage, is compendious and accurate.

(2) No corporation, whether aggregate or sole, ecclesiastical or temporal, can hold lands without due licence for that purpose; and the lord of the fee, or, in default of *his* entry within the time limited by the statutes, the king, may enter. (*a*) Before the 7 and 8 W. 3. the king's licence prevented only the forfeiture to himself (*b*); but that act is considered to extend its operation to any mesne lord, and consequently renders it effectual universally. (*c*) Since this statute, too, writs of *ad quod damnum* have ceased to be requisite preliminaries to this licence. (*d*) This abridgment of the power of a corporation to purchase lands is similar to that which prevailed in the civil law, which disabled a corporation from taking lands, unless by special privilege from the emperor. (*e*)

(3) Most gentlemen would add, *by way of conveyance only, and not by way of covenant or warranty*. But it is now agreed by every respectable text-writer, that even when the trustee conveys the inheritance by the word '*grant*,' no fear of an implied covenant or warranty need be entertained. (*f*) But the words "*bargain, sell, and release*," the usual words of conveyance by a trustee, were never supposed to have that effect, whence, in the present instance, such a restriction would be absurd.

(4) When the former words *are* inserted (but even then the pre-

(*a*) See Co. Litt. 2. b.
(*b*) F. N. B. 221.
(*c*) Harg. Co. Litt. 99. a. (1.) n. 108.
(*d*) Ibid.
(*e*) 1 Bl. Com. 479. n. y.
(*f*) See But. Co. Litt. 384. a. (1.)

caution would surely be superfluous), Mr. Butler recommends this means of expressly contradistinguishing the conveyance of the beneficial owner, from the guarded one of the trustee, and observes that he should be made to "grant" "*fully and absolutely.*"

(5) In grants of lands to sole corporations, the word *successors* is necessary to supply the place of *heirs* (*g*); but in conveyances to corporations aggregate, that word, though usually inserted, is needless. (*h*) Sir William Blackstone's observation that such a *simple* grant is *strictly only an estate for life*, but perpetual, or equivalent to a fee-simple, because a corporation aggregate never dies (*i*), erroneously assumes that the law distinguishes between *such* a grant, and one which contains a limitation to the successors, and that it *allows* the former to confer a *virtual* inheritance, in consequence of the legal immortality of that corporation; whereas the truth is that the limitation to its successors is *merely nugatory*, and a fee-simple, therefore, *as effectively and directly* given to it without, as with, that limitation.

(6) The student will recollect that a corporation may be a bargainee (*k*), inasmuch as though it cannot stand seised to uses (*l*), it may a cestuique use. (*m*)

(7) It is inferrible from what has been said, that this express mention of *the successors*, &c. is, however usual, quite needless. (*n*)

(*g*) 1 Inst. 8. b. (*h*) Ibid. 9.
(*i*) 2 Comm. 109. (*k*) 10 Co. 24—34. 2 Roll. Abr. 787. pl. 8.
(*l*) Gilb. Uses, 5 Bac. Read. 57.
(*m*) Bodies politic are expressly mentioned by the statute of uses.
(*n*) Et Vid. p. 44. (42.)

PRECEDENT XIV.

TO USES, ETC. BY THE ASSIGNEES OF A BANKRUPT WHO CONCURS AND COVENANTS FOR THE TITLE.

THIS INDENTURE, &c.

I. Parties. Between J. Jones and B. Ball, of, &c. of the first part, S. Sims, of, &c. of the second part (1), C. Clark, of, &c. of the third part, and R. Roe, of, &c. of the fourth part. [*Last purchase conveyance of the hereditaments hereinafter described, to S. Sims*, 17.]

II. Recitals.

1. Purchase deed.

2. Commission of bankrupt. AND WHEREAS a commission of bankrupt under the Great Seal of Great Britain, bearing date on the day of at Westminster, was awarded against the said S. Sims, whereunder he was duly declared a bankrupt, and the said J. Jones and B. Ball were duly chosen his assignees: And by an indenture of bargain and sale, duly enrolled (2) in his Majesty's Court of Chancery (3), and bearing date on the day of last, the major part of the commissioners named in the said commission, conveyed the real estate of the said bankrupt (including the hereditaments aforesaid), unto the said J. Jones and B. Ball, and their heirs, in trust for themselves and such of his creditors as should prove their debts

Bargain and sale of the commissioners.

3. Contract for sale by the assignees.

under the said commission: AND WHEREAS, the said J. Jones and B. Ball, as such assignees, have contracted with the said C. Clark, for the sale of the aforesaid hereditaments, with their appurtenances, as hereinafter mentioned, at the price of £ (4): And the said S. Sims has agreed to concur in these presents (5): NOW THIS INDENTURE WITNESSETH, that in pursuance of this contract, and in consideration of £ of, &c. to the said J. Jones and B. Ball, as such assignees as aforesaid, paid by the said C. Clark at or before, &c.,* the receipt of which said sum they the said J. Jones and B. Ball do hereby respectively acknowledge, and therefrom release the said C. Clark, they the said J. Jones and B. Ball "as such assignees," by these presents DO release, and the said S. Sims by these presents DOTH grant, release, and confirm, unto the said C. Clark, [*Bargain and sale*, 18, *bargainors, the assignees and bankrupt.*] and his heirs. [*Parcels.*] [*Appurtenances*, 19.] [*Deeds* (6), ibid.] [*Habendum to the purchaser in fee to uses to prevent dower*, ibid.] [*Covenant by the assignees, that they have done no act to incumber.* (7) 60. IX.] *General covenants for title by the bankrupt* (8), 20.]

III. Testatum.

IV. Operative part.

In witness, &c.

* Vid. sup. 18. II.

(1) A bankrupt is always made a party, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title. (*a*)

(2) A modern writer has said (*b*), that if the commissioners convey by *bargain and sale*, an enrolment within six months is necessary, in consequence of the instrument falling within the operation of the statute of enrolments (*c*): but this idea is strangely erroneous, as that statute applies only to bargains and sales which are derived from the statute of uses. Hence, as the late bankrupt act (*d*) enables the commissioners to convey *estates tail* by deed indented and enrolled, without requiring the enrolment to be made within six months, as was before necessary for barring them, it follows that although such deed is a bargain and sale, yet the enrolment is now efficient, though made after the six months. Hence estates in fee-simple and estates tail are placed precisely on the same footing, with reference to the manner in which they may be conveyed by the commissioners.

Another learned writer on the bankrupt laws has observed, that the 65th section of the late act gives only a *base fee* to the assignees, and not a fee-simple, unless the bankrupt have also the ultimate remainder in fee. (*e*) But it is certainly most clear, that *since* that act, as *before* it, the conveyance of the commissioners, made with a due observance of the required solemnities, produces exactly the same effect as might have been produced by the bankrupt himself before the act of bankruptcy. Thus, if he was tenant in tail in possession, and could, therefore, have suffered a recovery, the conveyance of the commissioners has the same effect that such a recovery would have had, if it had been duly suffered before the bankruptcy; and consequently gives an absolute fee, notwithstanding the bankrupt was tenant in tail with the remainder or reversion in a third person. (*f*) But if he was tenant in tail in remainder after an estate for life, with the remainder or reversion in fee in another, then the conveyance of the commissioners can give the assignees only a base fee (*g*), because the only assurance which the tenant in tail could have adopted for passing his estate, was a fine with proclamations, which would have worked no bar to the remainder or reversioner. (*h*) The case of Jervis *et al.* v. Tayleur (*i*), which this learned writer

(*a*) Sugd. Vend. 472. 7th Ed.
(*b*) Eden's Bank. Laws, 225. 2d Ed.
(*c*) 27 H. 8. c. 16.
(*d*) 6 G. 4. c. 16.
(*e*) Archbold on Bankruptcy, 113.
(*f*) 21 Jac. 1. c. 19. s. 12., continued by 6 G. 4. c. 16. s. 65.
(*g*) Per Abbott, C. J. 3 Bar. & Ald. 565.
(*h*) Vid. Touch. 14. 3 Rep. 84. Jenk. 274.
(*i*) 3 Bar. & Ald. 557.

cites as confirmatory of his general proposition, will be found to support and illustrate the distinction which has been drawn.

(3) The conveyance of the commissioners is termed a *bargain and sale*, because those are usually, though not necessarily, its operative words. All that the legislature requires is, that it shall be by deed indented and enrolled. I have said also, enrolled *in chancery*; but the deed may be enrolled in any of his majesty's courts of record. (*k*)

(4) It is (we may observe) now settled that assignees of a bankrupt stand in the situation of ordinary vendors. (*l*) Consequently they must make the same title as vendors *sui juris*.

(5) Formerly the bankrupt could not be compelled to join with his assignees in the conveyance of his property to purchasers. But now by 6 G. 4. c. 16. s. 78., the Lord Chancellor, on the petition of the assignees, or of any purchaser from them, of any part of the bankrupt's estate, (if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity), may order the bankrupt to join in any conveyance of such estate or any part thereof; and if he does not execute it within the time directed by the order, he and all claiming under him are estopped, and all his estate as effectually barred by such order, as if he had executed the conveyance.

(6) When the title deeds cannot be delivered, the assignees, like any other vendor, must give attested copies of them, at the expense of the estate; but if they covenant to produce the deeds, their covenant should in prudence be confined to period of their continuance as assignees. (*m*)

(7) The purchaser is only entitled to this covenant from the assignees. (*n*).

(8) The bankrupt is generally made to enter into covenants for the title, in the same manner as he would have done had he sold the estate while solvent. (*o*)

(*k*) 6 G. 4. c. 16. s. 64.
(*l*) 12 Ves. J. 277.
(*m*) 2 Rose, 215.
(*n*) Sugd. Vend. 472. 7th Ed.
(*o*) Ibid. 473.

PRECEDENT XV.

BY THE ASSIGNEE OF AN INSOLVENT DEBTOR IN PURSUANCE OF THE PROVISIONS OF THE INSOLVENT DEBTORS' ACT; WITH THE CONCURRENCE OF A TRUSTEE IN WHOM THE LEGAL ESTATE FEE IS VESTED, AND WITH THE SURRENDER BY THE SAME ASSIGNEE, OF A SATISFIED TERM FOR THE PURPOSE OF MERGER.

THIS INDENTURE, &c.

Between T. Tope, of, &c. of the first part, W. Ward, of, &c. of the second part, C. Crabb, of, &c. of the third part, and R. Roe, of, &c. of the fourth part: WHEREAS, by indentures of lease and release, bearing date respectively on the days of , and made between G. Giles, a trustee, under the last will of J. Tope, late of , &c. being a will bearing date on the day of , and proved in the court of on the day of), of the one part, and L. Lake of the other part, the hereditaments hereinafter described were conveyed to the said L. Lake and his heirs, to such uses generally, as he should by any deed or deeds duly executed and attested, appoint, and in default of such appointment, and in the mean time and subject thereto, to the use of the said L. Lake and his heirs(1): AND WHEREAS the equitable estate only in the said heredita-

I. Parties.

II. Recitals.

1. Lease and release to uses.

2. In whom the legal estate is.

ments was in the said G. Giles, at the dates of the said indentures of lease and release, and the legal estate therein, subject to the trusts of the said will, descended to the said T. Tope as heir at law of the said J. Tope, deceased (2): AND WHEREAS the said L. Lake has been discharged from the custody of , under the provisions of an act of parliament passed 1 G. 4. c. 119. (3), and intituled "An Act for the Relief of Insolvent Debtors in England," and by indenture bearing date on the day of and made between the said L. Lake of the one part, and J. James (the provisional assignee of insolvent debtors, pursuant to the said act), of the other part, the said L. Lake did convey to the said J. James, his successors and assigns (4), all his real and personal estate, (subject to the incumbrances on the same), in trust nevertheless for the benefit of several persons specified as creditors of the said L. Lake in his schedule, filed in the said court, and against whose demands the said L. Lake had by the order of the said court been discharged, and for such other purposes as are in the said act expressed: AND WHEREAS by indenture bearing date on the day of , and made between the said J. James of the one part, and the said W. Ward of the other part, the said J. James did convey unto the said W. Ward, his heirs, executors, administrators, and assigns, all the

3. Conveyance to the provisional assignee of the insolvent debtor.

4. Conveyance by the provisional assignee to the assignee.

freehold hereditaments whereof the said L. Lake was seised, on the day of then last, and also all other the real and personal estate of the said L. Lake, conveyed to the said J. James as such provisional assignee as aforesaid, (subject to the incumbrances, if any, on the same), and as to the said freehold hereditaments, to the use of the said W. Ward, and his heirs (5), in trust, nevertheless, as to the whole of the said real and personal estate, for the benefit of the persons specified as creditors of the said L. Lake, in his schedule, filed in the said court, and against whose demands the said L. Lake had been discharged as aforesaid, and for such other purposes only as were in the aforesaid act expressed concerning the same: AND WHEREAS, the hereditaments hereinafter described were subject to a mortgage to E. Ellis, as the personal representative of H. Hands, so far as relates to the residue of a term of 500 years therein, he being, to that extent, the administrator of the goods of the said H. Hands, which were left unadministered by W. Wortly (6), as by letters of administration, obtained by the said E. Ellis, from the prerogative court of Canterbury, and bearing date on or about the day of , will appear: AND WHEREAS, the said mortgage has been since paid off, and by an indenture bearing date on or about, &c., and expressed to be made between the said E.

5. Premises were subject to a mortgage.

6. Mortgage paid, and term assigned.

Ellis of the one part, and the said W. Ward of the other part, the residue of the said term was assigned to the said W. Ward, discharged from the proviso for redemption contained in the indenture by which the said

7. Sale by auction.

term was created: AND WHEREAS the said W. Ward, after duly pursuing the directions of the said act of parliament in that behalf (7), caused the hereditaments hereinafter described to be offered for sale at a public auction, held at on the day of , and the said C. Crabb attended the said auction, was the highest bidder for the same hereditaments, and declared the purchaser thereof at

8. Request that the inheritance may be conveyed to uses, and the term surrendered.

the price of £ ; AND WHEREAS the said C. Crabb has requested that the same hereditaments may be conveyed to the uses hereinafter limited, and that the said term of 500 years therein, so far as it may be subsisting (8), may be surrendered for the purpose of

III. Testatum.

merger: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited

Consideration.

contract, and in consideration of the sum of £ of, &c. to the said W. Ward, paid by the said C. Crabb at or before the execution

Trusts on which it is to be held.

of these presents, to be held by him the said W. Ward, upon the trusts expressed by the said indenture, bearing date on or about the day of , the receipt of which said sum, and that it is in full for the absolute purchase of the fee-simple of the said hereditaments, free

from all incumbrances, the said W. Ward doth hereby acknowledge, and from the same sum doth hereby release the said C. Crabb; he the said T. Tope, by the direction of the said W. Ward, and with the consent of the said C. Crabb, by these presents DOTH release, and the said W. Ward by these presents DOTH release and confirm (9), and also surrender and assign unto the said C. Crabb, [*Bargain and sale*, 18, *bargainors*, *T. Tope and W. Ward*, 59.] and his heirs. [*Parcels*, .] [*Appurtenances*, 19.] *Deeds*, ibid.] [*Habendum to C. Crabb in fee to uses to prevent dower*, 19.] *Covenant by T. Tope and W. Ward, that they have done no act to incumber*, 60. IX.]

IV. Operative part.

(1) These limitations would, until lately, have raised two questions, both of which have been much agitated. First, whether by conveying to the purchaser to such uses as he shall appoint, and in default of appointment to the use of himself in fee, he is not *in* by the common law (*a*), which would nullify the power. Secondly, whether the power is void by coinciding with the fee. Both points are now settled in the negative. (*b*) The writer has elsewhere endeavoured to give the *rationale* of them. (*c*)

(2) When uses were fiduciary the conveyance of the cestuique use was enabled by the statute of 1 Rich. 3. c. 1., to pass the legal estate. The question has been raised, and much agitated in modern times, whether as a trust is in substance what the ancient use was, that statute is not in force and applicable to them. (*d*) It is, however, generally considered, and always in practice, that that statute was repealed by the statute of uses. A legislative declaration of the

(*a*) 1 Sand. Uses, 155. 1 Prest. Est. 160.

(*b*) The first by the case of Moreton v. Lees, cited Sugd. Pow. 133. The latter by Maundrell v. Maundrell, 10 Ves. J. 246. Ray v. Pung, 5 Bar. & Ald. 561.

(*c*) Essay on Uses, 50, 51—172.

(*d*) See Blake v. Foster, 8 Term Rep. 487—494.

contrary is infinitely to be wished, as by giving the cestuique trust the same control over the legal estate that the cestuique use had after the statute of Richard, it would obviate every real inconvenience arising from passive trusts, which of late have been so much complained of.

(3) This act was amended by 5 G. 4. c. 61., and both acts are now consolidated by 7 G. 4. c. 57.

(4) By 1 G. 4. c. 119. s. 4. the prisoner was directed to make a conveyance in such manner and form, as the court for relief of insolvent debtors should direct, of all his real (*e*) and personal estate to the provisional assignee, subject, however, to a proviso to be void after the petition of the prisoner praying for his discharge, in case he did not obtain it. This is, in substance, continued by 7 G. 4. c. 57. s. 11., which enacts that the prisoner shall, at the time of subscribing such petition, duly execute a conveyance to the provisional assignee, in the form annexed to the act, of all his estate, real and personal, (except as therein mentioned), subject to a proviso to be void in case of the dismissal of the prisoner's petition.

The conveyance is to the *successors* of the provisional assignee. It was enacted by 3 G. 4. c. 123. s. 1., continued by s. 16. of the late act, that all property which vested in the provisional assignee by virtue of the prisoner's conveyance, should not remain in him if he resigned or was removed, nor in his heirs, executors, or administrators, in case of his death, but should vest in his successor in office.

(5) The insolvent debtor's court may, at any time after the filing of the prisoner's petition, appoint a *creditor* assignee; and when he has signified his acceptance of the appointment, the estate vested in the provisional assignee (*f*) must be immediately conveyed to him in trust for himself and the rest of the creditors; and it vests in him by relation to the conveyance to the provisional assignee, except that it does not invalidate any act done thereunder. See 7 G. 4. c. 57. s. 19.

(6) The interest vested in the executor by the will of the deceased may be continued by the will of the same executor (*g*); and *his* executor is the representative of the original defunct; but it is otherwise of the administrator of the executor (*h*); and, therefore,

(*e*) For which he may bring ejectment without authority from the court or creditors, Doe v. Spencer, 3 Bingh. 203.

(*f*) See 3 Bing. 203. 2 Car. & Payne, 79. (*g*) 1 Leon. 275.

(*h*) Or of the executor of an administrator. Bro. Abr. tit. Administrator.

if the latter dies intestate, the course of representation is interrupted (*i*), and administration must be committed afresh of the goods of the deceased not administered by the former executor. (*k*) This officer is called an administrator *de bonis non*; but he may have, and most frequently, in cases like the present, has only a limited or special administration, *quoad* the specific effects; *e. g.* the outstanding term.

(7) Now by s. 20. of the late act, the assignees must, within six months after the conveyance to them, or within such other time as the court shall direct, sell the prisoner's *real* estate by public auction, in such manner and at such place as shall, 30 days before, be approved in writing by the major part in value of his creditors, who shall meet on notice of such meeting, published 14 days previous thereto, in the way therein specified.

(8) It may be observed, that this term did not merge by the assignment to Ward, as he had only an equitable estate.

(9) The reader will observe, that the assignee does not execute the general power, which was vested in the insolvent; but had not the legal fee been vested in T. Tope, he would have been made to do this; for by sec. 12. of 1 G. 4. c. 119. continued by sec. 22. of 7 G. 4. c. 57. the assignees are enabled to execute all powers which the insolvent might have executed for his own benefit. This provision was copied from the bankrupt Acts.

(*i*) Sty. 225. (*k*) Ibid.

PRECEDENT XVI.

TO USES, &C. OF A RECTORY BY A SURVIVING TRUSTEE HAVING THE LEGAL ESTATE, AND WHO CONVEYS BY THE DIRECTION OF THE CESTUIQUE TRUST FOR LIFE AND CESTUIQUE TRUST OF THE REMAINDER IN FEE, WHO COVENANT FOR THE TITLE.

THIS INDENTURE, &c.

I. Parties. between G. Grant, of, &c. of the first part, B. Blair, of, &c. widow, of the second part, J. Blair, of, &c. of the third part, N. Noble, of, &c. of the fourth part, and R. Roe, of, &c. of the fifth part: WHEREAS, by indentures of lease and release bearing date respectively on the and days of , the release made between C. Carr of the first part, A. Adams of the second part, and B. Bond and the said G. Grant of the third part, the hereditaments hereinafter described were conveyed to and to the use of the said B. Bond and G. Grant, and their heirs, on divers trusts, by virtue whereof they now stand limited in trust for the said B. Blair for life, with remainder to the said J. Blair, her son, in fee: AND WHEREAS the said B. Bond is dead, and the said G. Grant, in whom, therefore, the legal estate of the said

II. Recitals. 1. Lease and release. to trustees. Trusts. 2. Agreement of the surviving trustee.

hereditaments is now vested, has agreed to join in these presents for the purpose of conveying that estate: AND WHEREAS the said N. Noble has agreed with the said B. Blair and J. Blair for the purchase of the said hereditaments as hereinafter mentioned, for the sum of £ , "and has requested that they may be conveyed to the uses hereafter limited:" NOW THIS INDENTURE WITNESSETH, that in performance of the said contract, and in consideration of the sum of £ of sterling money to the said B. Blair and J. Blair, paid by the said N. Noble at or before the execution of these presents, in full for the absolute purchase of the fee-simple of the said hereditaments, free from all incumbrances, the receipt of which said sum the said B. Blair and J. Blair do hereby acknowledge and therefrom respectively release the said N. Noble; — he the said G. Grant, at the request of the said B. Blair and J. Blair, by these presents DOTH release, and the said B. Blair and J. Blair, according to their respective interests, by these presents DO grant, release, and confirm, unto the said N. Noble [*Bargain and sale*, 18. *Bargainors, G. Grant, B. Blair, and J. Blair*, 59.]

3. Contract.

III. Testatum.

IV. Operative part.

Parcels. And his heirs all that the parsonage or rectory impropriate of B , in the said county of , with the glebe lands,

tithes (1), and other, &c. [*Appurtenances, sup.* 19. VI.]

[*Deeds*, 19.]

V. Habendum. TO HAVE AND TO HOLD the hereditaments (2) hereinbefore described, with their appurtenances, to the said N. Noble and his heirs to the uses [*Uses to prevent dower*, 19, IX.]

VI. Covenants. [*Covenant by the said G. Grant, that he has done no act to incumber*, 61.]

1. By trustee.

2. For the title by cestuique trust for life and person in remainder. And the said B. Blair, as concerning the acts and defaults of herself, and her ancestors or testators, but to the value only of her equitable estate for life in the said hereditaments, and the said J. Blair, as concerning only the acts and defaults of himself and his ancestors or testators, but to the value only of his equitable remainder in fee in the said hereditaments, do hereby severally covenant with the said N. Noble as follows, — that is to say, that notwithstanding any thing made, done, or suffered, by them the said B. Blair and J. Blair, or either of them, their or either of their ancestors or testators, or by the said G. Grant (except as hereinafter is excepted), they the said G. Grant, B. Blair, and J. Blair, or one of them, now have or hath in themselves, himself, or herself, good right, &c. [*vid. sup.* 95. *as connected with* 20. *substituting, however,*

(95) *for the* " said G. Carr, deceased," " the ancestors or testators of the said B. Blair and J. Blair respectively, or any of them."]

(1) Whatever is appendant will pass under the word *appurtenances.* (*a*) And an express mention of the tithes as an appendancy to the principal subject-matter of the deed, seems to make no difference; for if one convey a rectory, and all tithes thereto belonging, if the rectory does not pass from the conveyance being insufficient for the transfer of corporeal, though abstractedly sufficient for that of incorporeal hereditaments, the tithes do not pass. (*b*)

(2) That the word "*hereditament*" will include a rectory, parsonage, &c. see R. Dyer, 351. a.

PRECEDENT XVII.

OF AN ESTATE PUR AUTER VIE; — AN INFANT TRUSTEE WHO HAS THE LEGAL ESTATE, JOINING WITH THE VENDOR TO CONVEY IT UNDER 7 ANNE, C. 19. AND AN ORDER OF THE COURT OF CHANCERY. (1)

THIS INDENTURE, made, &c.

I. Parties. between R. Rich, of, &c. of the first part, W. Wills, of, &c. of the second part, and B.

II. Recitals. Ball, of, &c. of the third part: WHEREAS,

(*a*) 3 Lev. 165. and in general the incident passes without it. Comyn's Dig. Grant, E. (11.)

(*b*) See Sav. 63. where the rectory did not pass for defect of livery.

1. Lease for lives. (2) by indenture bearing date on the day of , and made between G. Gall of the one part, and J. Rich of the other part, for the considerations therein expressed, the said G. Gall did demise unto the said J. Rich, his heirs, executors, administrators, and assigns (3), the hereditaments hereinafter described thenceforth during the lives of A. B. and C. and the life of the survivor of them In trust. (in trust, however, for the said W. Wills), under the yearly rent of £10, payable as therein mentioned, and subject to the covenants therein contained: 2. Trustee's death intestate. AND WHEREAS the said J. Rich has since died intestate, as far as relates to the said hereditaments, leaving the said R. Rich, who is now a minor, his eldest son and heir at law: 3. Contract. AND WHEREAS the said W. Wills has contracted with the said B. Ball for the sale of the said hereditaments as hereinafter mentioned, for the sum of £ :

III. Testatum. NOW THIS INDENTURE WITNESSETH, that in consideration of £ of sterling money to the said W. Wills paid by the said B. Ball immediately before the execution of these presents, in full for the absolute purchase of the said hereditaments during the continuance of the several lives aforesaid, free from all incumbrances (except as hereinafter mentioned), the receipt of which said sum the said W. Wills doth hereby acknowledge, and therefrom release the said B. Ball;—

Infant trustee. In performance of the trusts, and of an order of chancery, and by virtue of 7 Anne. he the said R. Rich, at the request of the said W. Wills, and in performance of the trusts reposed in his said father, deceased (4), and in obedience to an order of the high court of chancery on the 15th day of July last past, made on the petition of the said W. Wills, and pursuant to a statute passed in the 7th year of the reign of Queen Anne, intituled, "An Act to enable infants who are seised or possessed of estates in trust or by way of mortgage to make such conveyances of such estates," — by these presents DOTH release, and he the said W. Wills by these presents DOTH grant, release, and assign, unto the said B. Ball and his heirs [*Bargain and sale*, 18. *Bargainors R. Rich and W. Wills*, 59.] *all*, &c. [*Parcels.*] [*Appurts.*] and all the tenant (5) right of renewal (if any) and interest whatever, of the said R. Rich and W. Wills in the said hereditaments, together with the aforesaid indenture of lease: TO HAVE AND TO HOLD the hereditaments hereinbefore described, with their appurtenances, unto the said B. Ball and his heirs, henceforth during the natural lives of the said A. B. and C. and the life of the survivor of them, subject, however, to the rent, covenants, and agreements contained in the said indenture of lease, and which were to be paid and performed by the said J. Rich, deceased, his

Releases. Cestuique trust, grants, &c. Parcels. IV. Habendum.

V. Covenants for the title.

heirs and assigns: AND the said W. Wills doth hereby, for himself and his heirs, covenant with the said B. Ball, his heirs, executors, administrators, and assigns, that notwithstanding any thing made, done, or suffered by him and the said J. Rich, deceased, and R. Rich, or either of them, they the said W. Wills and R. Rich, or one of them, hath good right to convey the hereditaments hereby released in manner aforesaid: AND that subject to the payment of the rent, and observance of such of the covenants and agreements in the said indenture of lease as run with the land, it shall be lawful for the said B. Ball and his heirs and assigns at all times hereafter, during the continuance of the estate hereby conveyed, peaceably to enjoy the same hereditaments with their appurtenances, and to receive the profits thereof without, &c. [*ut sup.* 20. 2.]

1. Good right to convey.

2. Quiet enjoyment.

3. Freedom from incumbrances.

[*For freedom from incumbrances, ut sup.* 21.] (except the rent, covenants, and agreements contained in the said indenture of lease on the part of the said J. Rich, deceased, his heirs and assigns) [*For further assurance* "of the said hereditaments held for the lives of the said A. B. and C. and the life of the survivor of them," *vid. sup.* 21.]

4. Further assurance.

AND the said B. Ball doth hereby, for himself and his heirs, covenant with the said R. Rich, his heirs, executors, administrators,

5. Purchaser's covenant.

and assigns, that he and his heirs, some or one of them, shall at all times hereafter during the continuance of the estate hereby released, pay the rent and perform the covenants and agreements in the said indenture of lease reserved and contained, and from the same respectively, and all expences on account thereof, indemnify the said R. Rich, his heirs, executors, and administrators. (6) In witness, &c.

(1) The statute 7 Anne, c. 19. enables and compels all infant trustees and mortgagees to convey as the court of chancery or exchequer shall direct; only, however, when they are bare trustees, not where they are to execute particular trusts. (*a*) But it is now held (*b*), contrary to the older authorities (*c*), that a constructive trust, raised by a contract for the sale of an estate, is within the statute.

(2) A leasehold for another's life is, in the strict propriety of legal language, an estate pur auter vie; — of course a freehold, and only transferable by the same species of conveyance as is requisite to pass an estate in fee. Sir W. Blackstone, on coming to an assignment, observes, that "it is *properly* a transfer or making over to another of the right one has in *any* estate, but that it is usually applied to an estate for life or years." (*d*) This is exceedingly inaccurate. An assignment, properly so called, is confined to an estate for years. (*dd*) An estate for life in possession cannot be passed but by feoffment or lease and release.

(3) The propriety of inserting the words of limitation in the recital of a lease pur auter vie, may be inferred from what has been said in a former page. (*e*)

(4) The express negation of a covenant or warranty, &c. which, notwithstanding the utter impossibility of its arising (*f*), many gentlemen would throw in here, is omitted in this place, as well as in the subsequent grant by the cestuique trust.

(*a*) 2 Cox, 221. Ibid. 422. (*b*) Smith v. Hibbard, 2 Dick. 730.
(*c*) P. Wms. 549. 3 Ibid. 387. 2 Ves. 559.
(*d*) 2 Comm. 326.
(*dd*) This point is again adverted to in a future page, with reference to the strict meaning of the word "feoffment." (*e*) P. 41. (n. 36.)
(*f*) See 1 Inst. 384. a. n. 1.

(5) The interest which is generally termed *a tenant right of renewal*, is particularly applicable to leases from the crown, from the church, from colleges, or from other corporations; and though only a matter of *favour and chance*, the right to it is guarded by courts of equity. (*g*)

(6) Vid. Sup. 146. n. 6.

(*g*) How far, and in what manner, it is recognised by equity, see But. Co. Litt. 290. b. XI.

CHAPTER II.

APPOINTMENT.

In the observations we have had occasion to make on the nature of powers, much has necessarily been said which might, perhaps, be more peculiarly applicable to appointments; the power and appointment which exercises it possessing, in truth, the close connection of cause and effect.

The few remarks which it will be proper to make on this assurance, will be introduced in the annotations on it; and as a brief but able explanation of its abstract nature has been given by a contemporary writer (*a*), the author will refer his readers to it, taking the liberty, however, of dissenting from some of its propositions. That gentleman observes, that "the difference between an appointment and a declaration of use consists in the latter being an *original* disposition of the use by the express consent of the parties, which prevents it from following any implied designation which the rules of law might otherwise prescribe, and the former being a limitation of the use by a separate instrument derived from and conformable to a power reserved or contained in the original conveyance, by which the seisin to serve the uses is transferred; whence it *necessarily alters, abridges, or suspends,*

(*a*) See 2 Sand. Uses, tit. Appointment.

the *use previously declared* upon such original conveyance." (*b*) But this mode of distinguishing them is conceived to be objectionable. An appointment, undoubtedly, *is* a declaration of use; being, to a common declaration, as the species to the genus. It is, therefore, a declaration of use, possessed of certain specific qualities; the principal of which, — viz. its power of barring dower (*c*) or curtesy; — of raising a use which may operate as a remainder expectant on a particular estate created by the instrument containing the power (*d*), notwithstanding the rule, that the particular estate and remainder must be limited simultaneously (*e*); — its important effect of admitting, in a similar manner, the rule in Shelley's case (*f*), notwithstanding that rule requires the limitations of the freehold and inheritance to be in the same deed or will (*g*); — will be found to emanate from its retrospection to, and legal combination with, the conveyance creating the power. (*h*) Again, a declaration of use is not *necessarily an original* disposition of the use, preventing it from following any implied designation which the law might otherwise prescribe; as this definition is evidently inapplicable to declarations subsequent. And an appointment does not *necessarily* alter, abridge, or suspend, the use previously *declared* upon the original conveyance. If there be a conveyance to the use of B. for life, remainder to such uses as he shall appoint, without any ulterior declaration of the use in default of appointment, the inheritance *results*; and when the appointment is made, the implied designation of the rules of law is prevented precisely, to this purpose, the same as in the case of a declaration subsequent; and here, consequently, the limitation in the appointment does not alter, suspend, or abridge, any use *previously declared.*

(*b*) 2 Sand. Uses, 71.
(*c*) Ray v. Pung, 5 Bar. & Ald. 561.
(*d*) The writer has endeavoured to evince and explain this in his Essay on Remainders, p. 45.
(*e*) 1 Inst. 49. a.
(*f*) Fearne, 74—5.
(*g*) Doug. 470.
(*h*) 7 Term Rep. 347.

It will not be necessary to present the reader with a simple appointment in its separate state;—first, because it is rarely alone the medium of a purchase deed;—secondly, because it may be easily abstracted from the accompanying conveyance.

PRECEDENT XVIII.

APPOINTMENT TO THE USUAL USES OF A PURCHASE DEED, WITH A RELEASE BY WAY OF FURTHER ASSURANCE; IN WHICH THE VENDOR RETAINS THE TITLE DEEDS, AND COVENANTS TO PRODUCE THEM.

THIS INDENTURE, &c.

I. Parties. between A. Adams, of, &c. of the first part, H. Hale, of, &c. of the second part, and G. Gross, of, &c. of the third part: WHEREAS (1), by indentures of lease and release, bearing date respectively on or about (2), &c. the release expressed to be made between N. Nokes of the first part, the said A. Adams of the second part, and D. Doe of the third part, for the valuable considerations therein expressed, various hereditaments, and, among them, those which are

II. Recitals.

1. Conveyance to uses.

hereinafter described, were conveyed to the said A. Adams and his heirs to such uses generally, as he, at any time or times, by any deed or deeds to be sealed and delivered by him in the presence of and attested by one or more credible witness or witnesses, should appoint; and in default of such appointment, and in the mean time subject thereto, to the use of the said A. Adams for life, remainder to the use of the said D. Doe and his heirs during the life of the said A. Adams in trust for him and his assigns, with remainder to the use of the said A. Adams and his heirs [*Contract for sale, sup.* 18.];

2. Contract. Testatum. [*Testatum, ibid.*]

III. Operative part. He the said A. Adams, in the exercise of the aforesaid power, "and of every other power enabling him in this behalf (3)," by this his deed sealed and delivered in the presence of the two credible persons, whose names are hereon indorsed as witnesses attesting such sealing and delivery,

1. Appointment. DOTH appoint, that all the hereditaments hereinafter described, shall, immediately after the execution of these presents, enure to the uses hereinafter limited (4); and by way of further assurance only (5),

2. Release. by these presents DOTH grant and release to the said H. Hale [*Bargain and sale,* 18.] and his heirs [*Parcels.*] [*Appurtenances,* 19.]:

IV. Habendum. TO HAVE AND TO HOLD the hereditaments hereinbefore described to the said H. Hale and his heirs to such uses generally (6), by way of rent-charge or otherwise, as he, at any time or times, by any deed or deeds lawfully executed (7), shall appoint, and in default of and subject to such appointment, and as to those parts of the said premises to which it shall not extend (8) [*Dower, uses, ut supra*, 20.]:

V. Covenants. AND the said A. Adams doth hereby, for himself and his heirs, covenant with the said H. Hale, his appointees, heirs, and assigns, in manner following, — that is to say, that notwithstanding any thing made, done, or suffered, by him the said A. Adams, he hath

1. Right to appoint and convey. good right by these presents to appoint the said hereditaments to the uses hereinbefore limited; and also, by way of further assurance, to release the same hereditaments in manner aforesaid, and according to the intent of these presents [*the other covenants for title as in p.* 20, 21. *except that when the* grantor, his heirs and assigns, *are there spoken of, the word* appointees *must be added to them*]: AND WHEREAS the title deeds and writings relating to the said purchased premises, relate also to more valuable lands of the said A. Adams, and are therefore to remain in his custody, on his covenanting to produce them, and furnish attested copies

VI. Recital. Title deeds to remain with grantor.

of them, to the effect hereinafter contained:

VII. Further testatum. WHEREFORE THIS INDENTURE LASTLY WITNESSETH, that in pursuance of the same agreement, and for the considerations aforesaid, the said A. Adams doth hereby, for himself and his heirs, further covenant with the said H. Hale, his appointees, heirs, and assigns, that he, the said A. Adams, his heirs, appointees, or assigns, unless prevented by fire, or some other inevitable accident, which may happen to the deeds and writings hereinafter mentioned, while kept by the said A. Adams, as he shall keep his own deeds and writings or other valuable effects, will, from time to time hereafter, on every reasonable request in writing, and at the costs of the said H. Hale, his appointees, heirs, or assigns, produce or cause to be produced (but in England only) unto the said H. Hale, his appointees, heirs, or assigns, or to any person or persons whom he or they shall, under his or their hands, appoint for that purpose, "or to any court of law or equity, or at any trials, hearing, commission for the examination of witnesses, or otherwise (9)," as occasion shall require, the said several deeds and writings, undefaced, and uncancelled, for the proof of the title of the said H. Hale, his appointees, heirs, or assigns, to the said pre-

Covenant to produce them,

and give attested copies.

mises: AND ALSO, that the said A. Adams, his heirs, executors, or administrators, will, from time to time, at the request and costs of the said H. Hale, his appointees, heirs, or assigns, deliver to him or them fair, true, and attested copies or extracts of and from the same deeds and writings, or any of them, and suffer such copies and extracts to be examined with the originals thereof, either by the said H. Hale, his appointees, heirs, or assigns, or any person or persons whom he or they shall appoint in manner aforesaid for that purpose. (10) In witness, &c.

(1) When brevity is desirable, we may, in an appointment, adopt a mode of recital analogous to that of the seisin of the vendor. For as, abstractedly speaking, enough is said when the nature of the title is accurately demonstrated, it is sufficient to recite, simply, that *the hereditaments hereinafter described now stand limited to such uses*, &c.

(2) The reference in the operative part of the appointment to the power contained in a particular indenture would create a dependency on the recital of it (*a*), but for the usual sweeping declaration that the *deed is in execution of all other powers*, &c. If that declaration be omitted, these cautious words should therefore be inserted; and *vice versâ*. (*b*)

(3) Mr. Butler remarks, that this precaution is *often proper*, but *certainly sometimes superabundant*. (*c*) As at the present day it is the invariable practice to recite deeds as bearing date *on or about*, &c., a case must be of an extremely singular complexion in which this clause is *not* superabundant.

(4) The student will observe, that the appointment is to the uses

(*a*) See p. 24. (n. 6.)
(*b*) Vid. infra.
(*c*) Co. Litt. 272. a. VII. 2.

hereinafter limited. This remark is material, because with those who are ignorant of the nature and effect of an appointment, it is a common error to make the appointment to the releasee himself. The consequence is, that as an appointment is only a limitation of use, the *legal estate*, and not a mere seisin to uses, vests in the purchaser, and when he executes his power of appointment, he gives only an equitable interest to the appointee, as the use in such appointee is a use upon a use.

(5) We may omit the double *testatum* as most unquestionably redundant. In all the cases on the question whether an assurance of the fee made by the grantee under a release to uses, operated as an appointment or a conveyance, the courts have admitted intention to be the governing principle. It is true, that such intention has been deduced from accompanying circumstances; and when the words of appointment and conveyance have been confounded, it has led the courts to opposite results. Up to a recent period a conveyance made by a person who has a power of appointment, with the fee in default of appointment, without any reference to the power, was held to have been decisive evidence of an intention not to execute the power. (*d*) In Cox v. Chamberlain (*e*), proceeding also upon the ground of intention, it was decided that when such a donee makes an instrument blending the words of appointment and conveyance, and the effect of its operation as an appointment would be to create equitable instead of legal estates, and thereby frustrate its object, it shall be construed to be a conveyance. In the late case of Wynne v. Griffith (*f*), the limitations were (so far *as is material to the present point*), to such uses as A. B. C. and D. should jointly appoint, and in default of such appointment, to the use (as to part of the premises) of C. for life, with remainder as to that part, and immediately as to the rest of the premises, to the use of A. in fee. A. B. C. and D. *granted, bargained, sold, released, confirmed, directed, limited, and appointed*, to L. in fee, to the use (among other uses), of himself for a term of 500 years, in trust to raise portions. L. was also made trustee to support contingent remainders. It was held that the latter instrument operated as a conveyance. As the judgment of the court was given by certificate, we are left to infer the reason on which they grounded it, and that appears to be the *intention* deducible from the circumstance of the deed having been to uses, and clearly

(*d*) Clere's Case, 6 Rep. 17. Cro. Eliz. 877. Cro. Ja. 31.
(*e*) 4 Ves. J. 631. (*f*) 3 Bingh. Rep. 179.

contemplating a mere seisin in L., the grantee, to serve them ;—a contrary supposition militating with the fact of the term being limited to him, and of his being a trustee, to support contingent remainders. But though there was no allusion to the power in the deed on which the question arose, this case goes farther than Cox v. Chamberlain, where the conveyance was expressed to be made in pursuance of all powers ; for (as we have seen) two only of the donees had an interest in default of appointment, and the fee in the whole premises was in fact vested in one of them ; and it was, therefore, a great stretch of the pre-existing rule to construe the instrument a conveyance. (*g*) The inference which may be drawn from these two cases is, that the circumstance of the parties intending the instrument to be an appointment is immaterial, if it can only effectuate their view, by operating as a conveyance ; the attainment of the contemplated objects being assumed as the general and predominating intent, which an appointment was erroneously supposed to be the means of executing. The case of Roach v. Wadham (*h*), in which the instrument was deemed an appointment, is professedly founded on the same principle of intention, but deducing it from different sources, and leading to different results. It seems to establish that when the donee of a general power, with the fee in default of appointment, makes an assurance in which the words of appointment and conveyance are blended, the junction of the grantee to uses is such strong evidence of intention to exercise the power; that it must appear very clearly from the deed, or the covenants therein, that it could not take effect unless it operated as a conveyance out of the interest. But the authority of this case is questionable ; for not only is it at variance with the cases of Cox v. Chamberlain, and Wynne v. Griffith, but with the principle established in Clere's case, that where the party has an interest as well as a power, he shall be taken to convey the former, and not to execute the latter. How the concurrence of the grantee to uses elicits an intent to exercise the power, it is not easy to perceive ; for no point is clearer than that his concurrence is as nugatory in the one case as in the other. As the execution of a power in a conveyance to uses is but an event raising a use, as well might it be said that when the event happens, on which a future use is limited to arise, the use does not shift or spring up of

(*g*) For as to two of the donees, (indeed to three of them, in respect to the fee), the case fell within the letter, though not within the spirit, of the rule established in Hob. 160. and in 6 Rep. 17.

(*h*) 6 East, 289.

itself, but the grantor of the seisin must convey to the cestuique use. But, to conclude, the point which has been discussed can only arise, when from a confusion of the words of conveyance and appointment, the intention may be deduced from attendant circumstances. It would be quite preposterous to contend, that any state of things would justify the courts in construing an instrument as a mere conveyance, when an appointment in pursuance of the power is first formally and distinctly made, and then a conveyance expressing to be only by way of further assurance. The insertion of another testatum clause is, therefore, nugatory.

(6) The present form is somewhat varied from, and briefer than the former one, p. 19. IX.

(7) *Vid. sup.* p. 40. (32.)

(8) It is clear, that without this express provision, the use would remain in the purchaser in so much of the land as the appointment did not embrace; for the use which is declared to him is in this respect evidently analogous to a resulting use, as to which the rule is, that so much of it as the grantor does not dispose of remains in him. (*i*)

(9) It is, I believe, an almost universal practice to add this indefinite provision, and when it is added, the previous specification of course is useless. Some gentlemen, however, do not extend the anticipated requisition beyond definite limits; and if the specification be full and accurate, this plan is, perhaps, the preferable one. This provision has been elsewhere expressed thus (*k*), "at any trial, hearing, or examination in any court of law or equity, or other judicature, or upon the execution of any commission in England, *as* occasion shall require;" omitting *or otherwise*.

(10) Mr. Fearne thought (*l*) (but his opinion in this respect was never attended to), that where a vendor retains the title deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession. In practice, however, he never enters into more extensive covenants on this account. (*m*)

Where a purchaser cannot obtain the title deeds, but only attested copies of them, it is because the latter are not sufficient security to him, that he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the pur-

(*i*) Co. Litt. 23. a. The *principle* of this rule applies more strongly to the *land* than to the *estate*.

(*k*) 2 Sand. Uses, 146. 4th Ed.

(*l*) Posth. 110.

(*m*) Sugd. Vend. 469. 7th Ed.

chaser (*n*); which should, in most cases, be made by a separate deed. Mr. Sugden observes, that where a vendor retains the deed, by which the estate he is selling was conveyed to him, (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed. (*o*) This remark is just; for even when the title may appear to be legal, it may, in fact, be only equitable; a term may be outstanding; and such a memorandum would then be the only means of preventing a vendor, under these circumstances, of committing an effective fraud, by selling the lands again to a *bonâ fide* purchaser without notice, who may on discovering the previous sale, protect himself by taking an assignment of the term. (*p*) This he may do, though the first purchaser, the person equitably entitled to the estate, has let it to a tenant who has taken possession; for notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. (*q*)

It is not unusual to add a proviso to this covenant, determining it in the event of the vendor's selling the part of the lands which he retains, and procuring him to whom the lands are sold and deeds delivered, to enter into a similar covenant with the first purchaser. The defeasance may be as follows:—

"*Provided nevertheless*, that if the said A. Adams, his heirs, appointees, or assigns, shall make an absolute and *bonâ fide* sale and conveyance of the other hereditaments to which the said deeds and writings relate, "and which are comprised in the before recited indentures of lease and release," or of the greater part in value of those hereditaments, and shall procure such grantee or grantees to enter into a covenant in relation to the same deeds and writings, to as full an extent as the one hereinbefore contained, and shall deliver such covenant (*r*) unto the said H. Hale, his heirs, appointees, or assigns, then the foregoing covenant shall cease, without prejudice, however, to any right which may have accrued to the said H. Hale, his heirs, appointees, or assigns, for any breach of the said covenant prior to its cesser.

(*n*) 2 Esp. Ca. 640. n.
(*o*) Vend. 465.
(*p*) Vid. sup. 69.
(*q*) Sugd. Vend. 745.
(*r*) It is generally said *deed of covenant*; but as the word "covenant" supposes a deed, (see Touch. 160), the expression is an incorrect one.

PRECEDENT XIX.

OF THE EQUITY OF REDEMPTION OF AN EQUITABLE REMAINDER IN FEE, IN FREEHOLD AND COPYHOLD LANDS, BY HUSBAND AND WIFE, IN PURSUANCE OF A JOINT POWER;—PART OF THE CONSIDERATION BEING AN ANNUITY, SECURED ON THE PURCHASED PREMISES, AND PAYABLE TO THE VENDORS FOR THEIR SUCCESSIVE LIVES.

I. Parties. THIS INDENTURE, &c. Between M. Mott, of, &c. and G. his wife, of the one part, and P. Pitt, of, &c. of the other part: WHEREAS, by certain indentures of lease and release bearing date respectively on or about, &c., the release expressed to be made between R. Roe of the first part, D. Doe of the second part, P. Platt of the third part, N. Nash of the fourth part, and M. Mott, and G. his wife, of the fifth part; and by a declaration of the uses of a fine in the same release mentioned, the freehold hereditaments hereafter described were conveyed to the use of the said P. Platt for her life, with remainder to the use of the said N. Nash in fee; and by a surrender then to be made of the copyhold hereditaments hereafter described, pursuant to a covenant in the said indenture

II. Recitals.
1. Settlement.
Uses of the freehold lands.
Of the copyholds.

of release, the same were to be assured to the use of the said P. Platt for her life, with remainder to the use of the said N. Nash and his heirs, to the intent that the said P. Platt might be admitted tenant thereof for her life, with remainder to the said N. Nash and his heirs (1); and the said indenture of release declared that the said freehold and copyhold hereditaments (subject as aforesaid), should be held by the said N. Nash and his heirs upon such trusts as the said M. Mott and G. his wife, at any time during their joint lives, by any deed or deeds under their hands and seals, to be executed in the presence of and attested by * one or more credible witnesses, should appoint (2), and subject thereto in trust for the said M. Mott and G. his wife, and their heirs: AND WHEREAS, by an indenture bearing date the day of , and made between the said M. Mott and G. his wife, of the first part, R. Read, of the second part, and the said N. Nash of the third part, for the considerations therein expressed, they the said M. Mott and G. his wife jointly, in pursuance of the aforesaid power, did by that their deed, executed as thereby required, direct and appoint the said freehold and copyhold hereditaments to be held by the said N. Nash and his heirs in trust to secure to the said R. Read the said sum of £ , with lawful interest for the same, and to that end

Declaration of trust.

* *Vid. sup.* p. 39. (31.)

2. Appointment by way of mortgage.

upon trust for sale as therein mentioned:

3. Money still due. AND WHEREAS, the said sum of £ still remains due to the said R. Read: AND

4. Contract. WHEREAS, the said P. Pitt has agreed with the said M. Mott and G. his wife, for the purchase of their equity of redemption in the said freehold and copyhold hereditaments, on the terms and for the considerations hereinafter specified (3):

III. Testatum. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said sum of £ , so due to the said R. Read as aforesaid, and in satisfaction thereof, and in consideration also of the sum of £ to the said M. Mott and G. his wife, paid by the said P. Pitt at or before the execution of these presents, the receipt whereof they do hereby acknowledge, and therefrom release the said P. Pitt, and also in consideration of an annuity of £ , secured and payable as hereinafter mentioned,

IV. Operative part. Appointment. they the said M. Mott and G. his wife jointly, in exercise of the aforesaid power (4), "and of all other powers in the same behalf," by this their deed executed by them in the presence of the credible witnesses, whose names are hereon indorsed, DO APPOINT unto the said P. Pitt and his heirs, all

Deeds, &c. [*Parcels.*] [*Appurtenances*, 19. .] [*Deeds*, ibid.]

V. Habendum in fee, TO HAVE AND TO HOLD the said freehold and copyhold hereditaments hereinbefore described, with their appurtenances, to

subject to what. " and to the use of" the said P. Pitt and his heirs, subject nevertheless to an estate for the life of the said P. Platt, and to the said annuity of £ , payable thereout to the said M. Mott during his life, and after his death to the said G. Mott during her life, and intended to be charged thereon by an indenture bearing even date with these presents (5):

VI. Covenants for the title. AND the said M. Mott doth hereby for himself (6) and his heirs covenant with the said P Pitt, his heirs and assigns, that notwithstanding any thing made, done, or suffered by him the said M. Mott, or his said wife, he

1. Good right to appoint. hath good right to appoint the said freehold and copyhold hereditaments in manner aforesaid, and according to the intent of these presents: AND that it shall be lawful for the said

2. For quiet enjoyment. P. Pitt, his heirs and assigns, at all times hereafter peaceably to enjoy the same hereditaments, with their appurtenances, and to receive the rents, and all arrears thereof now due, without any interruption or disturbance from the said M. Mott and G. his wife, or either of them, or of any person lawfully or equitably claiming or to claim any interest in the same hereditaments or any of them, by, under, or in trust for, the said M. Mott and G.

Exceptions. his wife, (except the said P. Platt, in respect of her aforesaid life-estate, and also except the high lord or lords of the fee of the said premises in respect of the rents, suits, and

services to be paid and performed therefore, and also except in respect of the aforesaid annuity of £): AND MOREOVER, that they the said M. Mott and G. his wife, and every person rightfully claiming or to claim any interest in the said freehold and copyhold hereditaments, or any part thereof, from, under, or in trust for them or either of them, (except as aforesaid), shall at all times hereafter, at every reasonable request, and at the sole expence in all things of the said P. Pitt, his heirs or assigns, make and do, or cause to be made and done, all such further lawful and reasonable acts and assurances in the law, be the same by fine, common recovery, deed enrolled or otherwise; for more perfectly assuring the said freehold and copyhold hereditaments, with their appurtenances (subject as aforesaid) to and to the use of the said P. Pitt and his heirs, as by him or them, or his or their counsel shall be reasonably advised and required, so as, &c. [*sup.* 22.] In witness, &c.

3. For further assurance.

(1) The admittance of the tenant for life is the admittance of the person in remainder. (*a*) This is one illustration of the general rule, that the particular estate and remainder form but one estate. (*b*)

(2) Of course this power is purely equitable; for N. Nash took the legal estate in the freeholds by the use being declared to him (*c*); and as to the copyholds, there was no necessity to declare the use

(*a*) The author has given the qualifications of this position in his Essay on Remainders, p. 65.

(*b*) Ibid. 63. Bac. Abr. Rem. (T.)

(*c*) 1 Sand. Uses, 93. Comb. 313.

to a gratuitous surrenderee in order to give him the legal estate therein; for to *this* extent the statute of uses does not extend to copyholds. (*d*) When uses are limited in copyhold surrenders, they are declared on the seisin of the lord; — that is, the surrender is at once to the uses.

(3) The practice of specifying in the recitals of the contract, all its terms, when numerous and particular, and of repeating them nearly *totidem verbis* in the witnessing part, is surely indefensible.

(4) It is observable, that as the power overrode only an equitable interest, and a mortgage is in equity regarded as a mere pledge, and, consequently, as but a partial disposition of the property which leaves the substantial ownership in the mortgagor, the power was not exhausted by the first appointment. Had it embraced a legal estate, a mortgage in fee by appointment would, at law, have totally extinguished it; but equity would have preserved it, even in that case, over the equity of redemption.

(5) Some gentlemen would insert here a declaration, that the trustee "should stand seised to the use of the purchaser," &c.; but as the legal estate follows the trust, which is formally and efficiently transferred by the appointment, such a declaration is useless.

(6) It is common but inaccurate to make the grantor covenant for himself "and the said his wife, and for his and her," &c. The impropriety of this form arises from the husband's inability to bind the wife or her representatives.

(*d*) Gilb. Ten. 170. Cro. Car. 44. How far it does, the author has elsewhere inquired. Essay on Remainders, 86 to 91. He is happy to find that the subsequent decision of Boddington v. Abernethy, 8 Dow. & Ryl. 626. is in perfect accordance with the opinions he there expressed.

PRECEDENT XX.

BY TWO (1) EXCHANGING PARTIES, WITH RECIPROCAL RELEASES BY WAY OF FURTHER ASSURANCE TO GRANTEES TO USES FOR BARRING DOWER IN BOTH THE RESPECTIVE ESTATES.

THIS INDENTURE, &c.

I. Parties. between H. Ham, of, &c. of the first part, W. Willes, of, &c. of the second part, and E. Ellis, of, &c. and P. Pearce, of, &c. of

II. Recitals. the third part: WHEREAS, by indentures of lease and release bearing date, &c.* for the

1. Conveyance to the first exchanging party. valuable considerations therein mentioned, the hereditaments hereinafter first described were conveyed to such uses generally as the said

2. To the second. H. Ham, by any deed, &c. [*sup.* 175.] [Recite a similar conveyance to W. Willes of the lands

3. Agreement to exchange, secondly described]: AND WHEREAS the said H. Ham and W. Willes have agreed to exchange (2) their said respective hereditaments; but as the said hereditaments agreed to be given in exchange by the said W. Willes, are of less value than the said hereditaments to be taken in exchange by him, it has been agreed, that he shall pay to the said H. Ham

and for equality of exchange. the sum of £ for equality (3) of exchange; and for effecting such exchange, the said parties have agreed to appoint and

* Vid. 174. II. 1.

release their said respective hereditaments
III. Testatum. to the uses hereinafter limited: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement on the part of the said H. Ham, and in consideration of the appointment and release hereinafter made by the said W. Willes, and of the sum of £ of sterling money paid by him to the said H. Ham, before the execution of these presents, for equality of exchange, the receipt whereof the said H. Ham doth hereby acknowledge, and from the same release the
1. Operative part. said W. Willes; — he the said H. Ham, in exercise of the power aforesaid, "and of every other power in the same behalf," by this his deed, sealed and delivered in the presence of, and attested by, the credible persons whose names are hereon indorsed as witnesses to such sealing and delivery,
Appointment by first exchanging party. DOTH APPOINT all the said hereditaments hereinafter first described, with their appurtenances, to the uses hereinafter limited:
2. Testatum. AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said agreement on the part of the said W. Willes, and
Appointment by the second exchanging party. in consideration of the appointment and release by the said H. Ham, he the said W. Willes, in exercise, &c. [*as before*, I. p. 175.]
3. Testatum. AND THIS INDENTURE LASTLY WITNESSETH, that in further pursuance of the said

agreement on the respective parts of the said H. Ham and W. Willes, and by way of further assurance of all the said hereditaments, he the said H. Ham, as to the hereditaments hereinafter first described, by these presents DOTH grant and release, and the said W. Willes, as to the hereditaments hereinafter secondly described, DOTH grant and release unto the said E. Ellis and P. Pearce (in their legal ownership now being, by a bargain and sale to them thereof, respectively made by the said H. Ham and W. Willes, in consideration of 5*s.* to each of them paid by the said E. Ellis and P. Pearce, and dated, &c. [*sup.* 18.] and their heirs;—first, all [*Parcels of H. Ham.*] [*Appurtenances, sup.* 19.] and secondly, [*Parcels of W. Willes*], together, &c. [*Appurtenances,* 19.]

Conveyance by way of further assurance by both parties.

IV. Habendum. [*Deeds,* 19.] TO HAVE AND TO HOLD all the said hereditaments hereinbefore respectively described, with their appurtenances, unto the said E. Ellis and P. Pearce and their heirs, to the several uses hereinafter limited,—that is to say, as to the hereditaments hereinbefore first described, to [*Uses to bar dower as to W. Willes, vid.* 19. IX.] and as to the hereditaments hereinbefore secondly described [*Uses to bar dower as to H. Ham, ibid.*];

Uses.

V. Covenant by both exchanging parties, AND each of them, the said H. Ham and W. Willes, as concerning only the hereditaments hereinbefore assured by him as aforesaid; and his own separate acts and defaults, doth

with the grantees of the seisin hereby, for himself and his heirs, covenant with the said E. Ellis and P. Pearce, and their heirs (4), in manner following, — that is to say, that notwithstanding any thing made, done, or suffered, by them, the said

respectively. H. Ham and W. Willes respectively, they

1. That they have right to appoint and convey. have good right respectively by these presents to appoint and release in manner aforesaid, and according to the intent of these

2. For quiet enjoyment. presents: AND that it shall be lawful for each of the said exchanging parties, his appointees, heirs, and assigns, to possess the hereditaments hereinbefore assured to him, with their appurtenances, and to receive the rents and profits thereof, without any interruption or disturbance from the other of them, or any person lawfully or equitably claiming through, under, or in trust for him or his heirs, or any of his ancestors:

3. For freedom from incumbrances. AND THAT free from all other interests, titles, tithes, liens, or other incumbrances, occasioned or suffered by the other of them the said H. Ham and W. Willes, or any person rightfully claiming or to claim the same at law or in equity, in or upon the said hereditaments hereinbefore first and secondly described respectively, or any part

thereof, through, under, or in trust for him, or by his means or default: AND ALSO that each of them, the said H. Ham, W. Willes, and every person rightfully claiming any interest at law or in equity in the said hereditaments hereinbefore respectively described, or any part thereof, under or in trust for him or his heirs, shall, at all times, on every reasonable request, and at the sole expence in all things of the other of them, his appointees, &c. *ut sup.* 21. 4.

4. For further assurance.

For more satisfactorily assuring the said hereditaments hereinbefore by him appointed and released, with the appurtenances, to the said E. Ellis and P. Pearce and their heirs, or otherwise, and according to the intent of these presents, as by the said H. Ham and W. Willes respectively, or their respective appointees, heirs, and assigns, shall, &c. [*ut sup.* 22.]

In witness, &c.

(1) An *exchange* cannot be between more than two distinct parties (*a*); but the writer conceives that the reasons (*b*) for confining an exchange deed to this number, do not apply to an exchange effected by an appointment, or a lease and release. (*c*)

(2) By adopting conveyances which are derived from the statute of uses, for the purpose of effecting an exchange, the common law requisition of entry, and the consequent inconvenience of the transaction being frustrated by the death of one of the parties before entry, are obviated. Hence exchanges are now usually effected

(*a*) Eton College v. Winchester, 2 W. Bl. 396. S. C. 3 Wils. 468. 483. Lofft. 401. (*b*) See them in Harg. Co. Litt. 50. a. (1.)

(*c*) See next note.

by lease and release; and, of course, when the parties have general powers of appointment, they reciprocally appoint the lands, as in the instance before us. But it appears to the writer, that there is a still greater advantage attending the present practice,—viz. that there is no necessity for using the word "*exchange*" in the operative part of the deed, in order to give effect to the reciprocal conveyances which are contained in it. It has, indeed, been said, that when an exchange is made by lease and release, all incidents annexed to an exchange at common law will be preserved (*d*); and this opinion has become general: but if the learned author, with whom it originated, meant, that when the lands are mutually released *without* the word *exchange* being used as an operative word, the condition and warranty of law *tacitè* implied in an exchange deed would be preserved, the proposition would seem to be incorrect; for it is among the fundamental rules of property that *that* word is *individually requisite* to an *exchange at common-law*. (*e*) And when it is used, and recognised as the operative word, by the admission of its peculiar effects, it is clear that the conveyance is *not* a *lease and release*; for *that* assurance cannot (as such) possess the specific properties of an *exchange*. The practical conclusion seems to be, that if the word "exchange" be used in the operative part of an instrument, which *without it* would be a *release*, and it has the effect of generating the condition and warranty of law, such instrument is *not* a release, but a common law exchange, operating on the reversions which are created by the bargains and sales; and that, on the other hand, when an exchange is effected by lease and release, and the word *excambium* is not used in the operative part of the instrument, the condition and warranty are not retained. (*f*) To avoid the regular incidents to an exchange is extremely desirable, since, in consequence of the reciprocal liability to entry and eviction, in the event of the title to the lands given being defective, it is necessary for a purchaser from either party to inspect the title of the lands which have been given, as well as of those which have taken in exchange (*g*); whence, at the present day, when the investigation of titles is expensive and laborious, the common-law doctrince is productive of great inconvenience.

(*d*) But. Co. Litt. 271. b. n. 231. (*e*) 1 Inst. 51. b.

(*f*) The remarks which have been made on an exchange effected by lease and release, are, of course, equally relevant to one effected by reciprocal appointments. (*g*) See 1 Prest. Abstr. 87.

(3) Or *owelty*, as it is generally termed; from *owel*, a word in our old law French, signifying equal.

(4) Since the seisin of a mere grantee to uses is not transmissible, it seems absurd to covenant with him and *his assigns*. The same remark is in strictness applicable to the word *heirs;* since the common law estate being *functus officio*, instantly on the conveyance, is, in fact, not descendible. (*h*) But it has been shewn, in a prior part of this treatise, that neither the one word nor the other is *requisite* to make the covenants run with the land. (*i*)

(*h*) This point is involved in a dissertation on the *scintilla juris* of the grantee to uses, in the author's Essay on Uses, pp. 130. 140. to which he will take the liberty of referring the reader. (*i*) *Sup.* 44. (42.)

CHAPTER III.

BARGAIN AND SALE.

BARGAINS and sales are of two kinds; — 1st. Those which are derived from the statute of uses (*a*); — 2dly. Those which are made in pursuance of a power, as, for example, by an executor in pursuance of a collateral power in a will, or by commissioners of bankrupt, &c. who exercise an authority conferred on them by act of parliament. Of the latter sort an instance has already been given (*b*), as bargains and sales by executors may be, and for the most part are, blended with a substantive conveyance by the person who has the legal estate. Bargains and sales derived from the statute of uses have now been, partly on account of the inconveniencies attending enrolment, partly because no uses can be declared in them to third persons (such uses being uses on uses) (*c*), almost entirely superseded in ordinary cases, by the two species of conveyances of which we have already treated. But there is one occasion in which a bargain and sale is still resorted to, viz. to make a tenant to the writ of entry for the purpose of suffering a common recovery; and when the lands are of considerable value, or intended to be sold in parcels, it is prudent to make the tenant to the præcipe by this conveyance, as it obviates

(*a*) 27 H. 8. c. 10.
(*b*) Ante, p. 107.
(*c*) Tyrrel's case, Dyer, 155. a.

the necessity of giving copies of the recovery deed to the purchasers. (*d*) We shall, therefore, give only a bargain and sale for this purpose; as, though made by tenant in tail, it is in fact the medium of passing the fee to the purchaser; for the estate tail is converted into a fee-simple by the operation of the recovery, and the declaration in the bargain and sale prevents the use from resulting to the recoveree, and fixes it in the purchaser. The declaration of uses in this conveyance is not inconsistent with what has been before stated, because the recoveror takes the common law seisin, and consequently the uses are declared on his estate, and not on that of the tenant to the præcipe. The student will observe, that the recovery will be void unless the bargain and sale which creates the freehold whereon it is suffered, is enrolled within six lunar months from the date of the deed. (*e*) This has been said to be *an anomaly* (*f*), because there is a seisin at the time when the writ of entry is sued; but the assumption should seem to be erroneous, for as the legislature has made enrolment within a certain period essential to the validity of the instrument, it follows that if that ceremony be not performed accordingly, the bargainee in legal consideration never possessed the land at all. Hence, before enrolment, within the six months the bargain and sale is good from (to use a quaint, but forcible expression of Lord Hardwicke's) the *prospect and pregnancy* (*g*) which it has to that ceremony; but after that time has elapsed without the enrolment having been made, an analogous *retrospect* nullifies it *ab initio*: consequently, though the *case* is *peculiar*, the *principle* it depends on is not *anomalous*.

(*d*) At least it is in such case prudent to have the tenant to the writ of entry made by some deed enrolled, 1 Prest. Conv. 40.

(*e*) Mullery v. Jennings, 2 Inst. 674. *Secus* of an equitable recovery, Smith v. Frederick, Russ. Rep. 174.

(*f*) 1 Prest. Conv. 38.

(*g*) In the same sense, but with regard to another subject; in his Lordship's beautiful judgment in Garth v. Cotton, Dickens, 183, published from his MSS.

PRECEDENT XXI.

BY A TENANT IN TAIL TO A TENANT TO THE PRÆCIPE DURING THEIR JOINT LIVES, FOR THE PURPOSE OF SUFFERING A COMMON RECOVERY, AND DECLARING THE USE THEREOF TO A PURCHASER IN FEE.

THIS INDENTURE, made, &c.

I. Parties. Between C. Clark, of, &c. of the first part, S. Smith, of, &c. of the second part, P. Pay, of, &c. of the third part, and W. Wright, of, &c. of the fourth part (1): WHEREAS, the

II. Recitals. 1. Seisin of tenant in tail. said C. Clark is by virtue of the last will of J. Clark, his late father, bearing date the day of , and proved in the prerogative court of the archbishop of Canterbury on the day of , seised of an estate tail in possession in the hereditaments hereinafter described: AND WHEREAS the said C. Clark

2. Contract for sale. has contracted with the said W. Wright for the sale to him of the said hereditaments, as hereafter mentioned, for the sum of £ , and

Agreement to suffer recovery. in order to effectuate the said agreement, the said C. Clark has agreed to suffer a common recovery for the purposes hereinafter ex-

III. Testatum. pressed: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of £ of sterling

money to the said C. Clark, paid by the said W. Wright, at or immediately before the execution of these presents, in full for the absolute purchase of the said hereditaments in fee-simple, free from all incumbrances, the receipt of which said sum the said C. Clark doth hereby acknowledge, and therefrom release the said W. Wright, and for barring all estates tail, and all interests (2) thereupon expectant in the hereditaments hereinafter described, and for limiting the same to the uses hereinafter declared, and also in consideration of ten shillings (3) to the said C. Clark, paid by the said S. Smith at the time aforesaid, the receipt whereof is also hereby acknowledged, the said C. Clark by these presents

IV. Operative words. DOTH GRANT, BARGAIN, AND SELL, unto the said S. Smith, [*Parcels.*] [*Appurtenances*, 19. VI.] and all other the hereditaments situate in the several towns, parishes, and places, of A. B. and C., in the ~~counties~~ county of ~~Devon and Dorset~~, in which the said C. Clark hath any estate tail at law or in equity, and every part of the same, with the appurtenances (4): TO HAVE AND TO HOLD the said hereditaments hereby bargained and sold with their appurtenances, unto the said S. Smith, during the joint natural lives of himself and the said C. Clark (5): TO THE INTENT that the said S. Smith may be tenant of the freehold of the said hereditaments with

V. Sweeping clause.

VI. Habendum.

VII. Declaratory clause.

their appurtenances, and a common recovery with double voucher be forthwith suffered thereof, wherein the said P. Pay shall be demandant, S. Smith tenant, and C. Clark first vouchee (6); and it is hereby declared that the said recovery, "when suffered (7)," shall enure to the use of the said W. Wright and his heirs: AND the said C. Clark doth hereby for himself and his heirs covenant with the said P. Pay (8), and his heirs,* that notwithstanding any thing made, done, or suffered, by the said C. Clark, or J. Clark, deceased, he the said C. Clark has now good right by these presents to bargain and sell, or otherwise assure, the hereditaments hereinbefore described, to the said S. Smith in manner aforesaid, and according to the intent of these presents. [Other covenants for title, *ut sup.* 20, 21, 22.] In witness, &c.

VIII. Declaration of the use.

IX. Covenants for title.

* *Vid. sup.* 195. (4).

(1) With the most esteemed practitioners there are never fewer than three parties in a recovery deed, viz., the tenant in tail, the intended tenant to the præcipe, and the intended demandant. When the tenant in tail has not the immediate freehold, there must (except when such immediate freeholder is only a lessee for life) (*a*), be another party, the tenant of that estate, who then stands first.

(2) Every interest ulterior to an estate tail is destroyed by the common recovery of the tenant in tail. (*b*) Its operation forms an exception to the rule which else holds universally (*c*), that future

(*a*) 14 G. 2. c. 20. s. 2. (*b*) 1 Mod. 108. 2 Lev. 28 1 Keb. 73.
(*c*) Mr. Sergeant Williams (2 Saund. 388. d.) is inaccurate, from not adverting to this exception.

uses and executory devises are not destructible by the taker of the antecedent estate. (*d*)

(3) Here we may remember, a nominal consideration is requisite; a consideration in money or money's worth being essential to the validity of a bargain and sale. (*e*) Perhaps, however, the valuable consideration which is paid by the purchaser, though not himself the bargainee, would support the instrument. (*f*)

(4) This is called a *sweeping clause;* and is (sometimes at least) proper, from the great importance of the recovery, and the necessity of comprising all the lands on which it is to operate in the recovery deed. Circumstances may render it desirable to insert the same clause in other conveyances.

(5) So long as the tenant to the præcipe takes a freehold, the extent of that estate is immaterial. The present habendum has not in the instance before us, where the grantor is assumed to be tenant in tail, the object which it generally intends to attain, viz., to enable the tenant of the immediate freehold, when only tenant for life, to join the tenant in tail in suffering a recovery without affecting the powers annexed to, or contingent remainders dependent upon his estate. The plan is efficacious, because of the reversion or interposed estate which is left in the grantor; and it has superseded the practice in vogue some years ago, and which was deduced from the doctrine of conditions. I shall conclude with observing, what I have on a former occasion taken the liberty of noticing (*g*), that the *declaration of use*, which is generally added to this habendum, is *unnecessary*, because, 1st, the estate conveyed is but a particular estate, which does not admit a resulting use (*h*); 2ndly, the object of the parties, which requires the continuance of the legal estate in the tenant to the præcipe, is at all times of itself sufficient to prevent a resulting use. (*i*)

(6) In a modern publication, the object of which was to prune the redundancies of modern conveyancing, it is properly observed, that the seven hundred words which here follow, prescribing most minutely the manner in which the recovery is to be suffered, were perhaps intended as instructions to the officer who passes the recovery: but the prothonotary never looks at the deed; and has,

(*d*) Cro. Jac. 590. Show. Parl. Ca. 137. (*e*) Vid. sup. 12. (3).

(*f*) Vid. Winch. 61. An averment of the payment of a pecuniary consideration may be made in the absence of a statement of it in the deed, 2 Inst. 672. 1 Rep. 176. a. 2 Roll. Abr. 786. N. pl. 1. and *ante*, 13. (3.)

(*g*) Essay on Remaind. 214. n. (28.) (*h*) Castle v. Dod, Cro. Ja. 200.

(*i*) Gilbt. Rep. 16. Doug. 25. This is a *general* remark. A declaration of use is at all times useless in a *bargain and sale.*

moreover, precise forms of his own from which he never varies. (*k*) This was probably the original object of inserting the load of words from which the precedent before us has been freed; but whatever was the object, it is clear that they are totally useless.

(7) The uses, the student will observe, will be derived to the purchaser out of the demandant's seisin; and, consequently, it cannot arise until the execution of the writ of seisin.

(8) It is a common practice with many eminent conveyancers, to make the vendor (the tenant in tail) covenant with the tenant to the præcipe; but (it is apprehended) against all principle; for the estate of the tenant in tail, and all interests derived from it, are evidently over-reached by the operation of the fictitious proceeding: and how can covenants annexed to the estate of the tenant to the præcipe run with the land, if the estate they were appended to is extinguished? By parity of reason it is, as to this point, immaterial whether the freehold of the tenant be a fee or for life. It is conceived, that the covenants may be entered into with the demandant, so as to run with the land; and if it be objected that he has no seisin at the time they are made, the answer is, that the courts at the present day regard the recovery deed and the recovery as parts of an integral assurance; and a legal consolidation of them when the whole is completed, gives an effect to intermediate transactions which could not else be supported. Thus the purchaser, taking under the present conveyance, might devise after the execution of the deed, but before the proceedings of the recovery have commenced (*l*); and though this use has been by some deemed a species of future use, or (as it is styled by Sir James Burrow (*m*)) a voidable contingent executory use, the more correct and intelligible ground for its capacity to be devised is the relation of the subsequent ceremonies to the recovery deed, forming, in the whole, one conveyance which commences from the date of the recovery deed.

This principle may clearly be called in, to give, *in fictione juris*, a sufficient seisin to the demandant at the time of executing the recovery deed, to enable the covenants entered into with him to run with the land in the same way as if the covenantee had been a feoffee or releasee to uses.

(*k*) Coventry's Concise Forms, 57.
(*l*) Selwyn v. Selwyn, 2 Burr. 1131.
(*m*) Ibid.

PRECEDENT XXII.

BY A DEVISEE IN TRUST, IN WHOM THE LEGAL FEE IS VESTED, BY THE DIRECTION OF HIS CESTUIQUE TRUST (A TENANT IN TAIL UNDER THE SAME WILL) AND HER HUSBAND, WHO COVENANTS FOR THE TITLE.

THIS INDENTURE, made, &c.

I. Parties. between J. Jones, of, &c. of the first part, S. Snow, of, &c. and E. his wife, of the second part, S. Say, of, &c. of the third part, M. Moor, of, &c. of the fourth part, R. Ray, of, &c. of the fifth part, and H. Hare, of, &c. of the sixth part: WHEREAS

II. Recitals. 1. Will. J. Eales, late of , being, at the date and execution of his will hereinafter recited, and so continuing without intermission to

Seisin. the time of his death, seised in absolute fee-simple, by purchase for a valuable consideration, of all the hereditaments hereinafter described, did, by such will bearing date on the day of , and duly executed and attested,

Devise to trustees. Trusts. devise the said hereditaments to and to the use of (1) the said J. Jones and his heirs, upon trust for his daughter, the said E. Snow, then E. Eales, spinster, and her heirs; but upon trust, in

case she died without lawful heirs, for his
2. Death and probate. son W. Eales and his heirs (2) [*Death of testator and probate*, 88. 2.]:
3. Contract for sale by cestuique trust in tail and her husband. AND WHEREAS the said S. Snow and E. his wife have contracted, &c. [*sup.* 18.] And in order to effectuate the said agreement, the said S. Snow and E. his wife have agreed to suffer a common recovery for
4. Agreement of trustee to join. the purpose hereinafter appearing: AND WHEREAS the said J. Jones, as such devisee in trust, has agreed to convey the said hereditaments to the said S. Say to the in-
III. Testatum. tent hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited contract, and in consideration of £ of, &c. to the said S. Snow and E. his wife paid, &c. [*ut sup.* 18.]
Real consideration. and for barring the aforesaid estate tail of the said E. Snow, and all interests thereupon expectant in the hereditaments hereinafter described, and for limiting the same to the uses hereinafter declared:
Nominal consideration to trustee. And also in consideration of 10s. of like lawful money to the said J. Jones paid by the said S. Say at the time aforesaid, the receipt whereof is also hereby acknowledged;—
IV. Operative part. he the said J. Jones, as such trustee as aforesaid, by the direction of the said S. Snow and E. his wife, by these presents DOTH BARGAIN AND SELL, and the said S. Snow and E. his wife by these presents

DO RATIFY AND CONFIRM unto the said S. Say [*Parcels.*] [*Appurtenances*, 19.]

V. Habendum. [Sweeping clause, 199. v.]: TO HAVE AND TO HOLD the said hereditaments hereby bargained and sold, with their appurtenances, to the said S. Say for the natural lives of himself and the said E. Snow, to the intent, &c. [*sup.* 199. VII.], wherein the said M. Moor shall be demandant, S. Say tenant, and the said S. Snow and E. his wife first vouchees: AND it is hereby declared by the said S. Snow and E. his wife, that the said recovery, when suffered, shall enure to such uses, &c. [*Dower uses in favour of the purchaser, R. Ray, ut sup.* 19. IX. *H. Hare dower trustee.*]

VI. Declaration of use.

VII. Covenant. [*Covenant by Jones,* as such devisee in trust as aforesaid, *that he has done no act to incumber, vid. sup.* 61.]

1. By trustee.

2. By the husband of the cestuique trust. AND the said S. Snow doth hereby, for himself and his heirs, covenant with the said M. Moor, that notwithstanding any thing made, done, or suffered, by them the said S. and E. Snow, J. Jones, and J. Eales, deceased, or any of them, they the said J. Jones, S. Snow, and E. his wife, or one of them, now have or hath in themselves good right, &c. [*ut sup.* 20. 21, 95.] In witness, &c.

(1) As at the present day it is clearly settled, that a devise of lands to trustees and their heirs to uses, admits the operation of the statute (*a*), there can be no doubt that a limitation to *the use* of the trustee upon trust, &c. gives him the legal estate in a will as well as in a deed. (*b*)

It may be here observed, that although in a grant to A. to the use of A. in trust for B., B. has *only* an *equitable* estate, yet that A. *takes at common law;* — a point on which, till recently, a variety of opinions prevailed (*c*), but which is now settled (*d*) in conformity with the inference which the author (*e*) ventured to draw prior to the decision.

(2) E. Eales takes only an estate tail under this devise, because W. Eales, the person in remainder, is collaterally inheritable to her; for as she cannot die without heirs general while he is living, her lineal descendants were evidently contemplated. (*f*) This construction has been even applied to a deed when the intent manifestly required it. (*g*)

(3) It has long been settled, that a common recovery is as necessary to bar an equitable as a legal estate tail. (*h*)

(4) The cautious practitioner may wish to insert the word "grant" (*i*), in order to give the instrument validity as a grant, should the subject-matter admit of its operating as such, and it should be void as a bargain and sale. But the caution is superfluous. The doctrine of the old authorities (*k*), that if the words *bargain and sale* be the operative words of the instrument, it is invalid without enrolment, no longer prevails; and according to

(*a*) But. Co. Litt. 271. b. 1 Cruise, Dig. T. 11. c. 4. s. 19. 2 Ed.

(*b*) Vid. 1 Atk. 581. Ca. T. Hard. 91. S. P. But. Co. Litt. 290. b.

(*c*) See Gilbert, Uses, 171. 194. 1 Sand. Uses, 93. Sugd. Gilb. Uses, 369. n. 2. 3 Ed. Mr. Sugden thought that A. was in by the *statute*. See his treatise on Powers, 3 Ed. 130.

(*d*) Doe d. Lloyd v. Passingham, 6 B. & Cres. 305. It is true, said Mr. J. Holroyd, that the trustees take the seisin by the common law, and not by the statute; yet they take that seisin to the use of themselves, and not to the use of another, in which case, alone, the use is executed by the statute. Ibid. 316. And see the authorities for the same doctrine cited by Bailey, J. 315.

(*e*) Essay on Uses, p. 40. (*f*) Webb v. Herring, Cro. Jac. 415.

(*g*) Doe v. Smeddle, 2 Bar. & Ald. 126.

(*h*) 2 Cha. Ca. 63. 78. 1 Vern. 13. 1 P. Wms. 91.

(*i*) Et vid. *sup.* 170. (4).

(*k*) Cro. Jac. 210. Moor, 34. Pl. 113.

the principle, that when a conveyance cannot operate in one form, it shall, if possible, in another;—it seems to be settled, that a bargain and sale may enure as a grant. (*l*)

(*l*) Cooke v. Bromehill, Noy. 66. overruling (it should seem) Adams v. Steer, Cro. Jac. 210. Moor, 34. pl. 113. and supported by the analogy of recent cases. See Cowp. 597. 5 T. R. 124. 5 B. & Cres. 101.

CHAPTER IV.

GRANT.

THE word "grant" is sometimes used in a generic sense, and is then synonymous with "conveyance;" but most usually and correctly it is a confined and specific term, and in that acceptation it may be defined to be the conveyance of an incorporeal hereditament. The prominent quality of this instrument is, that it must be a deed. (*a*)

As former writers have already treated of this assurance (*b*), the author will, after a simple enumeration of its objects, refer his readers to their works;— again, however, taking the liberty of expressing his dissent from them in a few particulars.

The various species of subject-matter which are transferable by grant are —

1. Reversions and vested remainders. (*c*)

(*a*) Litt. s. 551. 569. 578.

(*b*) See Shep. Touch. c. 12. 2 Sand. Uses, 25, &c.

(*c*) Perk. 61. Dyer, 174. Plowd. 433. Bro. Grant, 104. Mr. Sanders (2 Uses, 29.) says, vested remainders *in fee;* the words *in fee* being in Italics, and, consequently, emphatical and exclusive. But this qualification is erroneous. *Every* vested remainder is, unquestionably, grantable. Even a vested remainder in tail is transferable by a grant, — that is, a base fee is given determinable by the issue in tail or person in remainder or reversion, (Vid. Machel v. Clarke, 2 Ld. Ray. 778.) So that the same estate in *quality* is given by the *grant*, as by the *fine* of tenant in tail in remainder, to which last Mr. Sanders restrains the transferability of his estate. The difference between those assurances is merely that the base fee raised by the former is determinable both by the issue and remainder-man or reversioner (2 Salk. 619. 3 Burr. 704.); that created by the latter, by the remainder-man or reversioner only. Vid. 3 Co. 84. a.

2. Commons (*d*); — *except*, however, common appendant for pasture (*e*), and common appurtenant for cattle levant and couchant, or without number (*f*), for these cannot be severed from the land.

3. Rents; — which, when *in esse*, may be granted before the grantor has seisin (*g*); but one cannot grant a rent *de novo* out of lands of which he is not seised at the time. (*h*) But equity will bind the grantor on an after purchase of the lands (*i*); and he may be bound at law, if the grant be by an instrument which works an estoppel. (*k*)

4. Tithes.—5. Advowsons.—6. Corodies *certain*.—7. Services.—8. Seignories.—9. Franchises. (*l*)—10. Easements. (*m*) — But there are some kinds of incorporeal hereditaments (as offices of trust and confidence) which are inalienable, unless expressly granted to one and *his heirs*, or to one and *his assigns*. (*n*)

From the language of Mr. J. Blackstone, that the reason why freeholds cannot be made to commence *in futuro* is, because they cannot at the common law be made but by livery of seisin (*o*), the student might infer, that a freehold in incorporeal hereditaments, to which the learned Judge's reason is inapplicable, *might* be granted to take effect *in futuro*. But *that* is the case only with rents *de novo* (*p*); and the rule of the common law must therefore have resulted from some more general cause. It probably sprung from considerations of political expedience.

It is beyond the scope of this outline to speak of things of a *mixed* and *personal* nature, which are generally located

(*d*) Touch. 238, 239.
(*e*) Perk. 104. Cro. Car. 542.
(*f*) Cro. Jac. 15.
(*g*) Perk. 238.
(*h*) Ibid. 65.
(*i*) 1 Anst. 11. But the equity is said to be merely personal. Ibid.
(*k*) Touch. 11. 243. 2 B. & Ald. 244.
(*l*) For these vid. 2 Sand. Uses, 26—32. Touch. 231.
(*m*) As a drain, where it does not create an interest in the land. 5 Bar. & Cres. 221.
(*n*) Perk. 99, 100. Touch. 239. 241.
(*o*) 2 Bl. Commen. 165. 314.
(*p*) Bro. tit. Grant. 86. Plow. 156. 2 Vent. 204.

by the text writers under this title, with, however, a departure from what they acknowledge to be the correct definition of a grant; since those things are, of course, not *incorporeal hereditaments.* It is conceived, that some modern authors of great respectability have made the very serious mistake of supposing, that some of those things which the older treatises have (illogically enough) treated of under this head, really lie in grant; and, consequently, require a deed. Mr. Sanders, for example, makes no allusion to the generic nature which the term "grant" occasionally bears, and professedly treats of the several kinds of *incorporeal* hereditaments of a grantable quality under the title "Grant." (*q*) Yet does he place in the same predicament with advowsons, &c. chattels real, emblements, and title deeds. (*r*) None of these require to be transferred by *deed* (*s*), nor bear in truth the least analogy to an incorporeal hereditament, to which, alone, that gentleman begins with observing a grant is applicable. To confound in the same class, without any allusion to the difference between them, things so heterogeneous, might lead the student into a strange misconception.

(*q*) 2 Uses, 25, 26. (*r*) Ibid. 29—31.
(*s*) Vid. Touch. 232. and the distinction taken by Ld. Coke, 1 Inst. 85. a.

PRECEDENT XXIII.

OF AN ADVOWSON TO USES FOR, &C. WITH A COVENANT TO LEVY A FINE TO BAR THE DOWER OF VENDOR'S WIFE, WHO JOINS IN THE CONVEYANCE.

THIS INDENTURE, &c.

I. Parties. between G. Gould, of, &c. and Jane his wife of the first part, C. Cole, of, &c. of the second part, and S. Short, of, &c. of the third part: WHEREAS, L. Long, of, &c. being, at the date and execution of his will hereinafter recited, and so continuing to the time of his death, seised in fee (1) by purchase for a valuable consideration of the hereditaments hereinafter described, did, by such will duly executed and attested, and bearing date on the day of , devise all his hereditaments to his son, E. Long, for life, with remainder to his issue in tail, in the manner therein mentioned (2), and in default of such issue, to his right heirs for ever (3): AND WHEREAS the said testator died shortly after the date of his said will, leaving the said E. Long his only son and heir at law, and the said will was duly proved in the court of on

II. Recitals.

1. Will.

Devising for life with remainders over.

2. Death and probate.

3. Devise of the reversion in fee to the vendor.

the day of : AND WHEREAS the said E. Long having, as such heir at law, the reversion in fee of the said advowson, devised all the hereditaments that he should die seised of, to his wife (since deceased) for her life, and after her death, to the said G. Gould and his heirs: AND WHEREAS the said E. Long, shortly after the date of his said will, which has been duly proved, &c. died without leaving issue, so that the remainders limited to them as aforesaid failed: AND WHEREAS the said G. Gould has contracted with the said C. Cole for the absolute sale of the hereditaments hereinafter granted (subject to the incumbency of the reverend S. S.) for the price of £ : AND WHEREAS the said Jane Gould has consented to join her said husband in levying the fine hereinafter mentioned, for the purpose of barring all her title to dower in the same hereditaments: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of, &c. to the said G. Gould, paid by the said C. Cole, at or before the execution of these presents, in full, &c. [*sup. page* 18. II.]; the said G. Gould by these presents DOTH GRANT AND CONFIRM to the said C. Cole and his heirs, all that the advowson (4), in the rectory, and parish church of S., in the county of S., of which

4. Testator's death without issue.

5. Contract.

6. Wife of vendor to join in a fine.

III. Testatum.

IV. Operative part. Grant and confirmation.

the said S. S. is the present incumbent [*Appurtenances*, 19.]: To HAVE AND TO HOLD all and singular the said hereditaments hereby granted, with their appurtenances, to the said C. Cole and his heirs to the uses hereinafter limited, that is to say [*Uses to bar dower*, 19. IX.] AND the said G. Gould, for himself and his heirs, doth hereby covenant with the said C. Cole, his appointees, heirs, and assigns, that they the said G. Gould and Jane his wife (5) (she hereby consenting (6)) shall in or as of term now last, or term now next, or some subsequent term, acknowledge and levy unto the said C. Cole and his heirs before his majesty's justices of the court of common pleas at Westminster, in due form of law, one or more fine or fines *sur conuzance de droit come ceo*, &c. with proclamations according to the statute in that behalf, of the hereditaments hereby granted by such proper names and descriptions as shall be deemed necessary to pass the same (7): AND it is hereby declared, that the said fine or fines, when levied, shall enure to the uses hereinbefore limited: AND the said G. Gould, for himself and his heirs, doth hereby covenant with the said C. Cole, his appointees, heirs, and assigns, in manner following, — that is to say, that notwithstanding any thing made, done, or suffered by the said G. Gould or

V. Habendum

Uses.

VI. Covenant to levy a fine.

Declaration of its uses.

VII. Covenants for title.

1. Right to grant.

his said wife, or the said L. Long or E. Long, deceased, to the contrary, he the said G. Gould has good right by these presents to grant the hereditaments hereinbefore described to the uses hereinbefore limited:

2. For quiet enjoyment.

AND ALSO, that it shall be lawful for the said C. Cole, his heirs, appointees, and assigns, at all times hereafter, to hold and enjoy the hereditaments hereby granted, and every part thereof, with the appurtenances, and to present to the said church on every avoidance thereof, without any interruption or disturbance from the said G. Gould or his said wife, or any person or persons rightfully claiming any interest at law or in equity in the said hereditaments, or any of them, by, under, or in trust for the said G. Gould or his said wife, or either of them, or by, under, or in trust for the said L. Long and E. Long, deceased, or either of them [*Covenants for freedom from incumbrances, and for further assurance, vid.* 21, 22. 95.]

In witness, &c.

(1) The language strictly appropriated to the expression of a seisin in *corporeal* hereditaments (*in his demesne as of fee*), has been long disused by conveyancers. But the language of the precedent, though sanctioned by universal custom, is still more at variance with technical phraseology; for of an *incorporeal* hereditament one is only said to be seised *as of fee*. (*a*)

(*a*) See 2 Bl. Com. 106.

(2) When contingent remainders fail from the limitees not coming into existence, and the draughtsman is competent to judge of the effect of the limitations, it is irrelevant to set them forth.

(3) It is observable that this ultimate limitation, though formally and properly inserted, was productive of no legal effect. For it is an evident corollary from the ancient rule which flowed from the principles of the feudal system, that a man cannot limit a remainder to his heirs, unless he departs with the whole fee-simple out of his person (*b*); — that if a man by devise limits particular estates, and takes back the ultimate estate or fee-simple, either to himself or his right heir, by express limitation, a *remainder* is not thereby created, but he retains the original reversion. (*c*)

(4) *Patronage and right of presentation* are usually added; but we may reject these words as idly used. For the definition of an advowson, is the right of presentation; and as it signifies *in clientelam recipere*, it is synonymous with patronage. (*d*)

(5) The common practice of making a husband covenant for himself and his wife, and his and her heirs, has been properly remarked by Mr. Preston to be inaccurate, and to confound the lien with the stipulating part. (*e*)

(6) The object of expressing this consent is, to create an equity against the wife; but though the husband may, perhaps, be brought into contempt (even this is now extremely doubtful) for want of a specific performance of the covenant, it seems clear that the wife is not bound by her consent, but, till the act of record, retains a *locus pœnitentiæ*. (*f*)

(7) The common covenant to levy a fine is unconscionably prolix. Nearly the same remarks that were applied to the directing part of a recovery deed (*g*), are applicable to the detail into which this covenant usually descends.

(*b*) 4 H. 6. 19. b. pl. 6. Mo. 718.
(*c*) 1 Leon. 182. Poph. 3. 11 Mod. 181. 13 Ves. 413. 2 Bar. & Ald. 625.
(*d*) See 2 Bl. Com. 21. (*e*) 2 Convey. 83. et sup. 188.
(*f*) See Emery v. Wase, 5 Ves. Jun. 846. 8 Ves. Jun. 505. where the cases on this point were considered by Lord Eldon. (*g*) *Sup.* 201. (6).

PRECEDENT XXIV.

OF AN ADVOWSON BY WAY OF FURTHER ASSURANCE, BEING PRECEDED BY AN APPOINTMENT IN PURSUANCE OF A GENERAL POWER (1) OVERRIDING THE LEGAL ESTATE, SUBJECT TO A TERM OF 99 YEARS IN A TRUSTEE, WHO ASSIGNS IT TO A TRUSTEE FOR THE PURCHASER TO ATTEND THE INHERITANCE.

THIS INDENTURE, &c.

I. Parties. Between B. Bowles, of, &c. of the first part, W. Wood, of, &c. of the second part, C. Cox, of, &c. of the third part, and S. Smith, of, &c. of the fourth part: WHEREAS, by an indenture bearing date on or about, &c. and expressed to be made between J. James of the first part, W. Wood of the second part, B. Bowles of the third part, and D. Doe of the fourth part, and purporting to be an appointment of the hereditaments hereinafter described, and (so far as the same is grounded on a bargain and sale for a year, bearing date the day before the date of the said indenture), a release of the same hereditaments; and by a fine and common recovery respectively levied and suffered in pursuance of a covenant therein contained, and by a declaration of the uses of the said fine and recovery also therein

II. Recitals.

1. Appointment and release.

Fine and recovery.

Uses. contained, the hereditaments hereinafter described stand limited to the use of the said W. Wood for the term of 99 years, if the said B. Bowles should so long live, with remainder to such uses generally as the said B. Bowles should by deed or otherwise, as therein mentioned, appoint; and in default of such appointment, and subject thereto, to the use of the said D. Doe and his heirs, during the life of the said B. Bowles in trust for him, with remainder to the use of the said B. Bowles and his heirs; and by the first mentioned indenture it was declared that the said term of 99 years was limited to the use of the said W. Wood upon trust, that he or his assigns, should so often as the parish church of A. should become vacant, present such person thereto as the said B. Bowles or his assigns should by writing nominate: AND WHEREAS the said C. Cox hath contracted with the said B. Bowles for the purchase of the said hereditaments, as hereinafter expressed, at the price of £ ; AND WHEREAS the said W. Wood, at the request of the said B. Bowles, has agreed to assign the said hereditaments to the said S. Smith in the manner hereafter appearing. [*Testatum with the consideration*, ut sup. 18. II.]

Trust of the term.

2. Contract for sale.

3. Trustee's agreement to assign.

III. Testatum.

IV. Operative part. He the said B. Bowles, in exercise of the power aforesaid, "and of every other power enabling him in this behalf," DOTH by this

Appointment. his deed APPOINT, that the hereditaments hereinafter described shall henceforth be to the use of the said C. Cox and his heirs; and for the considerations aforesaid he the said B. Bowles by these presents DOTH

Grant and confirmation. GRANT AND CONFIRM unto the said C. Cox and his heirs, ALL that the advowson in the parish church of , in the said county of . [*Appurtenances*, 19.] [*Deeds*, ibid.]

V. Habendum. TO HAVE AND TO HOLD the said hereditaments hereby appointed and granted respectively as aforesaid, to and to the use of

VI. Covenants. the said C. Cox and his heirs: AND the said B. Bowles for himself and his heirs doth hereby covenant with the said C. Cox, his heirs and assigns, in manner following, (that is to say), that notwithstanding any thing made, done, or suffered by the said B. Bowles,

1. That grantor is lawful owner. "he the said B. Bowles is the lawful owner and patron of the said advowson and hereditaments hereby appointed and granted as aforesaid, and that notwithstanding any such

Vid. p. 44. (44). thing as aforesaid," he the said B. Bowles

2. That he has right to convey. has good right to appoint and grant the said hereditaments in manner aforesaid, and according to the intent of these presents, and that "notwithstanding any such thing as afore-

3. That the purchaser shall present, &c. said," it shall be lawful for the said C. Cox, his heirs and assigns, on the next vacancy "that may happen by the death, resignation, deprivation, cession, or change of L. L., the

present incumbent of the parish church aforesaid," to present some well qualified clerk to succeed in the said church as the incumbent or parson thereof (2), and thenceforth whenever the said church shall become vacant "by the death, resignation, deprivation, cession, or change, of all or any of the future incumbents or parsons thereof," to present some other well qualified clerk to succeed to the said church as the incumbent or parson thereof, and to do all other acts which belong to the patron thereof, as amply as the said B. Bowles, his heirs or assigns might do if these presents had not been made, without any interruption or disturbance from the said B. Bowles or his heirs, or any person lawfully or equitably claiming from, under, or in trust for him or them. [*Covenant against incumbrances, and for further assurance as in* p. 21, 22, *omitting the word* appointees.] AND THIS INDENTURE FURTHER WITNESSETH, that for the considerations aforesaid, and by the direction of the said B. Bowles, he the said W. Wood by these presents DOTH ASSIGN to the said S. Smith, "his executors, administrators, and assigns," the hereditaments hereinbefore described, with their appurtenances: "TO HAVE AND TO HOLD the same hereditaments with their appurtenances, unto the said S. Smith, his executors, administrators, and assigns," (3) henceforth during the residue of the said term

Without interruption.

VII. Further testatum.

Assignment to purchaser's trustee.

Habendum.

For the remainder of the term. In trust to attend. of 99 years upon trust for the said C. Cox, his heirs and assigns, to attend the inheritance of the same hereditaments, and to protect it from mesne incumbrances. [*Covenant by W. Wood, that he has done no act to incumber*, 61.] In witness, &c.

Trustee's covenant.

(1) An advowson may be granted to uses. (*a*)

(2) It is observable, that the sale of the *next presentation*, when the living is actually vacant, is simony (*b*); or, as it seems, when the incumbent is exceedingly ill, and on his death bed (*c*), for it has been lately determined that actual vacancy is not essentially necessary to make the contract void, and that the innocence of the clerk is immaterial. (*d*) But with respect to an *advowson*, it has been held that at any time a *bonâ fide* purchase of it is good. (*e*) And De Grey, C. J. has said, that the case in Burrow, in which the court held the grant of a next presentation, *or* of an *advowson*, made after the church was actually fallen vacant, to be void (*f*), *must*, as to the *advowson*, be a mistake of the *reporter*. (*g*) But however consonant to true principle the case of Barret v. Glubb may be, this dictum of his Lordship's was surely ill considered. An investigation of the doctrine would have shown the language of the report to be in unison with antecedent authorities. In Grey v. Hesketh, Lord Hardwicke was of opinion, that although the sale of an advowson during a vacancy was not within *the statute of simony*, as a sale of the next presentation is, *it was void by the common law*. (*h*)

(3) The habendum is not an *essential* clause, and in a *subordinate* part of the conveyance (like the present), it may, when compression is desirable, and the effect of inserting it is simply a repetition of the granting part, be omitted without impropriety.

(*a*) 2 Sand. Uses, 30. (*b*) Cro. Eliz. 788. Moo. 914.
(*c*) Fox v. Bp. of Chester, 2 B. & Cres. 635. (*d*) Ibid.
(*e*) Barret v. Glubb, S. W. Black. 1052.
(*f*) Bishop of Lincoln v. Wolforstan, 3 Burr. 1510.
(*g*) In Barret v. Glubb. And see Shep. Touch. 90. n. 88.
(*h*) Ambler, 268.

PRECEDENT XXV

OF RECTORIAL IMPROPRIATE TITHES TO USES FOR BARRING DOWER, IN WHICH TO THE GENERAL COVENANTS FOR TITLE, ARE ADDED MUTUAL COVENANTS BY THE VENDOR AND VENDEE FOR APPORTIONING TAXES.

I. Parties. THIS INDENTURE, &c.

Between B. Bond, of, &c. of the first part, W. Wright, of, &c. of the second part, and

II. Recitals. D. Duke, of, &c. of the third part: WHEREAS

1. Feoffment by an indenture of feoffment, dated the day of , and made between J. Jones of the one part, and E. Eales of the other part, and by livery of seisin made according to the form

of a rectory, &c. and effect of that indenture, the rectory of, &c. with the tithes and appurtenances thereof was conveyed to and to the use of E. Eales and his heirs (1); which said rectory formerly belonged to the monastery of in the said county, and after the dissolution thereof was by letters patent of Queen Elizabeth, under the great seal of England, bearing date at Westminster, the day of in the year of her reign, granted to S. Searle and his

2. Vendor's seisin as heir. heirs (2): AND WHEREAS, the said B. Bond (as the eldest son and heir at law of B. Eales, who was the wife of the said W. Bond, Esq.,

and only child of the said E. Eales), is seised in fee of the said rectory and tithes, except such parts of the latter as have been granted by way of endowment (3) to the vicar of the parish aforesaid: AND WHEREAS the said B. Bond has contracted with the said W. Wright, for the sale to him of the said tithes as hereinafter expressed, for the price of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited contract, and in consideration, &c. [*Ut sup.* 18. II.]

3. Contract for the sale of the tithes.

III. Testatum.

Operative part. He the said B. Bond, by these presents DOTH grant unto the said W. Wright and his heirs, all tithes as well great as small, and all oblations, and other (4) profits and appurtenances, to the said rectory belonging, or reputed to be parcel thereof, or in any wise arising upon or from ALL, &c.

IV. Habendum. TO HAVE, HOLD, AND RECEIVE the said hereditaments hereby granted, with their appurtenances, unto the said W. Wright and his heirs, to [*Uses to prevent dower* (5), 19.]

Uses.

V. Covenants for title. [*Covenants by B. Bond for the title, ut sup.* 20, 21—95, *viz.* 1. *Good right to convey.* 2. *Quiet enjoyment, beginning thus:* that it shall be lawful for the said W. Wright, his appointees, heirs, and assigns, to have and take the said, &c. 3. *Freedom from incumbrances,* [except the land-tax, now charged on the said hereditaments hereby granted. 4. *For further assurance.*] And each of them the said B. Bond

VI. Mutual Covenants. and W. Wright, for himself and his heirs, doth hereby covenant with the other of them, his heirs and assigns, that while the said hereditaments hereby granted shall be rated as a part of the said rectory, to any parliamentary or parochial assessment, then during the continuance of such assessment, and towards the same, the said W. Wright, his appointees, heirs, or assigns, shall contribute to the said B. Bond, his heirs or assigns, such part of the said assessments as shall be after the rate of and in proportion to , part of the present assessment, which are £ a year to the land-tax, £ towards the poor-rate, and £ towards the church-rate; But that either party, his heirs or assigns, shall be at liberty to acquire a separate assessment of his respective property. In witness, &c.

Apportioning the taxes.

(1) Estates in tithes are alienable by lay impropriators in the same manner as other real estates. (*a*)

(2) The grants made by the crown of the appropriated benefices which were vested in it by act of parliament, on the dissolution of the monasteries by Henry 8. are either of tithes of a particular tract of land, or, as in the present instance, of a rectory or parsonage which comprises the parish church with all its rights, glebes, tithes, and other profits whatsoever. (*b*) It is proper to allude to the letters patent in the recitals, because no good title can be made to tithes by a lay impropriator without showing them (*c*); this being the only mode of repelling any claim which may be made to those tithes by an ecclesiastical person claiming *jure ecclesiæ*. (*d*)

(*a*) 3 Cruise, Dig. 56. 3d Ed. (*b*) Ibid.

(*c*) Ibid. But in practice it is not considered necessary to trace the title through all the intermediate stages. 1 Prest. Abst. 30.

(*d*) The letters patent should be inspected, to see that no reversion remains in the crown. Such a reversion, the student will remember, is not barrable by the ecovery of tenant in tail. Plow. 553. 1 Inst. 335. a.

(3) All tithes, renewing within a parish, regularly ought to be paid to the rector of it (*e*); except those which the vicar claims by endowment or prescription. (*f*)

(4) *Obventions, pensions, portions, fruits, profits and hereditaments* (see next precedent), are the general words in a grant of tithes; but besides that they are of course included in the words *profits and appurtenances*, all offerings are by the statute 2 & 3 Ed. 6. 13. made payable to the parson, &c. or farmer of the parish where he dwells. (*g*)

(5) Lay impropriators may have any estate in tithes; they may be tenants in fee, in tail, for life, or for years. Hence husbands may be tenants by the curtesy, and widows endowed of them. The surest endowment of them is (says Lord Coke), by the third sheaf. (*h*) But the assignment is good, though tithes of the third yard-land be assigned. (*i*) Dower in tithes may in a conveyance of them to a purchaser, be barred, as in a conveyance of lands, by a limitation of the usual uses; for tithes are of course comprehended within the statute of uses, under the word hereditaments.

(*e*) Hob. 296. (*f*) 2 Buls. 27., and see Gwill. 226. 1526.
(*g*) Vid. Com. Dig. Dismes, (B.) (*h*) 1 Inst. 32. a.
(*i*) Ibid. *in notis.* Hal. MSS. n. 188.

PRECEDENT XXVI.

OF TITHES TO USES, ETC. BY THREE TENANTS IN COMMON IN FEE, SUBJECT TO DISTINCT POWERS OF APPOINTMENT IN EACH, WHICH THEY EXERCISE RESPECTIVELY, AND CONVEY BY WAY OF FURTHER ASSURANCE; CONTAINING ALSO A COVENANT BY THE PURCHASER RESPECTING TAXES, ETC. AND BY ONE OF THE VENDORS TO PRODUCE DEEDS.

THIS INDENTURE, &c.

I. Parties. Between W. Wood, of, &c. C. Coke, of, &c. and E. Edge, of, &c. of the one part, K. Kidd, of, &c. of the second part, and S. Swift, of, &c. of the third part: II. Recitals. WHEREAS, by an indenture bearing date on or about the day of , and expressed to be made between G. Gill, of the one part, and the said W. Wood, C. Coke, and E. Edge of the other part, three undivided third parts in the hereditaments hereinafter described, were limited respectively to such uses as each of them the said W. Wood, C. Coke, and E. Edge, by any deed or deeds, writing or writings, to be by him signed, sealed, and delivered, in the presence of one or more credible witnesses, should appoint, and subject thereto, with the remainder in fee to them respectively of such respective third parts (1): AND WHEREAS, the

1. Conveyance to the vendors to uses.

Remainder to each in fee.

2. Contract. said W. Wood, C. Coke, and E. Edge, have contracted with the said K. Kidd for the sale to him of the entirety of the said hereditaments as hereinafter mentioned, for the sum of £3000.

III. Testatum. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £1000 of sterling money paid by the said K. Kidd, to each of them the said W. Wood, C. Coke, and E. Edge, immediately before the execution of these presents, making the aggregate sum of £3000, in full for the absolute purchase of their said shares respectively, the receipt of which said several sums the said vendors do hereby respectively acknowledge, and from the same do release the said K. Kidd; and also in consideration of the covenants hereinafter contained on the part of the said K. Kidd, each of them the said W. Wood, C. Coke, and E. Edge, in exercise of the aforesaid power, "and of every other power enabling him in this behalf," by this his deed, signed, sealed, and delivered, by him in the presence of and attested by the two credible persons whose names are intended to be indorsed on these presents as witnesses of such signing, sealing, and delivery;* DOTH APPOINT that his said undivided third part in the said hereditaments (making together the entirety thereof), shall henceforth be to the

IV. Operative part. Appointment.

* Vide page 39. n. 31.

uses hereinafter limited; and for the considerations aforesaid they the said W. Wood, C. Coke, and E. Edge, according to their respective estates, by these presents DO GRANT AND CONFIRM unto the said K. Kidd and his heirs, all those the tithes, fruits, profits, oblations, obventions, emoluments and hereditaments, yearly renewing within the parish of Y., and every part of the same with their appurtenances: TO HAVE, HOLD, and receive the said tithes and hereditaments hereinbefore described, with the appurtenances, unto the said K. Kidd and his heirs, to such uses generally, &c. [*Ut sup.* 19. IX.] AND each of them the said W. Wood, C. Coke, and E. Edge, doth hereby for himself and his heirs, and as far only as concerns his undivided third part of the said hereditaments, covenant with the said K. Kidd, his appointees, heirs and assigns, that notwithstanding any thing made, done, or suffered by the said W. Wood, C. C. Coke, and E. Edge, they have good right respectively to appoint and grant the hereditaments hereinbefore described, in manner aforesaid, and according to the intent of these presents: AND that he the said K. Kidd, his appointees, heirs, and assigns, shall at all times hereafter receive or retain the same hereditaments without any lawful interruption or disturbance by them the said W. Wood, C. Coke, and E. Edge respectively, or their heirs,

Grant.

V. Habendum.

Uses.

VI. Covenants by the vendors respectively.

1. For right to appoint and grant.

2. For quiet enjoyment.

or any person or persons lawfully or equitably claiming from, through, under, or in trust for them or any of them: AND THAT free from all other interests, titles, liens, or other incumbrances, occasioned or suffered by the said W. Wood, C. Coke, and E. Edge, in their respective shares, or any person or persons rightfully claiming or to claim the same at law or in equity, in or upon the same shares respectively, or any part thereof, through, under, or in trust for them or any of them, or by their or any of their means, "or default:" AND that each of them the said W. Wood, C. Coke, and E. Edge, and his heirs, shall at all times hereafter, &c. [*See p.* 21. 4.] for more perfectly assuring his said third part in the said hereditaments, with the appurtenances to the uses hereinbefore limited, as by the said K. Kidd, &c. [*Ut sup.* 21. 4.

3. Freedom from incumbrances.

4. For further assurance.

VII. Agreement that purchaser shall contribute to what.

AND it is hereby agreed that in respect of the said hereditaments hereinbefore described, the said K. Kidd, his appointees, heirs, tenants, or assigns, shall henceforth contribute towards the land-tax, poor-rates, and repairs of the chancel of the church of the said parish of Y., (in exoneration of the residue of the same hereditaments), at the rate hereinafter mentioned (that is to say), [*here specify the proportions*]: AND the said K. Kidd doth hereby for himself and his heirs covenant with the said W. Wood, C. Coke, and E.

His covenant.

Edge, their heirs, executors, administrators, and assigns, that he and all claiming any estate under him, for the time being shall from time to time agree to be rated and taxed in the manner hereinbefore mentioned, and pay such assessments accordingly, or otherwise shall pay to the said W. Wood, C. Coke, and E. Edge, respectively, or their respective heirs, executors, administrators, and assigns, a contribution towards the same rates, taxes, and repairs, in the proportions hereinbefore mentioned, so as to indemnify the said W. Wood, C. Coke, and E. Edge respectively, and their respective heirs, executors, administrators, and assigns, from such proportions as aforesaid, of the same rates, taxes, and repairs, according to the intent of these presents: AND the said W. Wood for himself and his heirs doth hereby covenant with the said K. Kidd, his appointees, heirs, and assigns, that he the said W. Wood, his heirs, executors, administrators, or assigns, shall from time to time hereafter, on the request and at the costs of the said K. Kidd, his appointees, heirs, or assigns, unless prevented by fire or some other inevitable accident, produce to the said K. Kidd, his appointees, heirs, or assigns, agent or attorney, the instruments specified in the schedule hereunder written, and also permit him or them to take

VIII. Covenant to produce deeds.

copies or extracts from the same instruments.*

In witness, &c.

* See also the longer and more formal clause, *sup.* 177. VII.

(1) It is (as we have before noticed) (*a*) now settled that a power of appointment is not extinguished by co-existing with the fee (*b*); for the ground of nugatoriness on which the courts formerly relied (*c*), is justly deemed insufficient for the inference, as an estate can be *conveyed* only with ceremonious form; but an appointment, when unincumbered with gratuitous requisitions, may be made by a simple and unattested note in writing. (*d*)

PRECEDENT XXVII.

OF A REVERSION IN FEE EXPECTANT ON A TERM OF 99 YEARS DETERMINABLE WITH LIVES, BY A CORPORATION; — THE PURCHASER COVENANTING TO INDEMNIFY IT AGAINST ITS CONTINUING LIABILITY TO THE COVENANTS IN THE LEASE.

THIS INDENTURE, &c.

I. Parties. between the mayor and commonalty of the borough of A. in the county of D. of the first part, B. Ball, of &c. of the second part, and D. Dicks, of, &c. of the third part:

II. Recitals. WHEREAS the said mayor and commonalty,

1. Lease by their indenture of lease under their com-

(*a*) Sup. 160. (*b*) Maundrell v. Maundrell, 10 Ves. J. 246.
(*c*) Goodhill v. Brigham, 1 Bos. & Pul. 192. (*d*) 2 Salk. 467.

from a corporation.

mon seal (1) bearing date on or about (2) the day of , and expressed to be made between the said mayor and commonalty of the one part, and P. Potts of the other part, did demise the hereditaments hereinafter described unto P. Potts from the day of the date thereof, for the term of 99 years, if the said P. Potts and H. Potts his then wife, or either of them, should so long live, subject to the rent, covenants, and conditions therein set forth, and with a right of perpetual renewal on the terms therein

2. That it is still in being.

expressed: AND WHEREAS the said indenture of lease is now in operation: AND

3. Contract for the sale of the reversion.

WHEREAS the said mayor and commonalty are seised of the immediate reversion in fee-simple expectant on the aforesaid term in the said hereditaments, and have contracted (3) with the said B. Ball for the sale of the same reversion as hereinafter mentioned,

III. Testatum.

for the price of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £ of, &c. to the said mayor and commonalty paid by the said B. Ball, immediately before the execution of these presents, in full for the absolute purchase of the said fee-simple in reversion free from all incumbrances, except as hereinafter mentioned, the receipt of which said sum the said mayor and commonalty do hereby acknowledge,

and from the same do release the said B. Ball; — they the said mayor and com-

Grant. monalty (4) by these presents DO GRANT unto the said B. Ball and his heirs, all that the reversion (5) in fee-simple immediately expectant on the determination of the aforesaid term of 99 years, in all, &c. [*Parcels.*] [*Appurtenances*, 19.]

Deeds. "Together with all "indentures of lease and all counterparts thereof respectively, and all other" documents of title relating to the said hereditaments, or any part thereof, now in custody of the said mayor and commonalty, or which they or their successors may hereafter obtain without suit at law or in equity:"*

IV. Habendum. TO HAVE AND TO HOLD the said reversion in fee-simple in the said hereditaments, with their appurtenances, unto the said B. Ball and his heirs, to [*Uses to bar dower*, 19. IX.]

V. Covenants for the title. AND the said mayor and commonalty do hereby, for themselves and their successors (6), covenant with the said B. Ball, his heirs, appointees, and assigns, that notwith

1. Right to grant. standing any thing made, done, or suffered, by the said mayor and commonalty, or their predecessors, or any person or persons rightfully claiming under them, or any of them

* Or (as circumstances may require) take the more formal clause, *sup.* 19. VII. et vid. 33. (23).

(except as hereinafter excepted); — they the said mayor and commonalty now have good right to grant the said reversion in fee-simple in the said hereditaments hereinbefore described, with their appurtenances, to the uses and in the manner aforesaid: AND ALSO that it shall be lawful for the person or persons for the time being, entitled in possession under the same uses, immediately on the determination of the aforesaid term, and at all times thereafter, peaceably to enter upon and enjoy the said hereditaments, with their appurtenances, and also immediately from the execution hereof, and until the determination of such term, to receive the rents and profits of the same hereditaments, payable under the aforesaid lease, without any interruption or disturbance from the said mayor and commonalty, or any person or persons rightfully claiming any interest at law or in equity in the said hereditaments, through, under, or in trust for the said mayor and commonalty, or any of their predecessors or successors (except as hereinafter excepted): AND THAT freely discharged by them, the said mayor and commonalty and their successors, at their sole expence, against all interests and incumbrances whatever, at any time heretofore, or to be at any time hereafter, made or suffered by the said mayor and commonalty, or their predecessors

2. For quiet enjoyment.

3. Freedom from incumbrances.

or successors, or any person or persons rightfully claiming through, under, or in trust for the said mayor and commonalty, or their

Exception. predecessors or successors as aforesaid (except in respect of any of the covenants and agreements entered into by the said mayor and commonalty in the said indenture of lease, and which run with the land, and bind the said B. Ball, his appointees, heirs, and assigns; but against which the said B. Ball has agreed to indemnify the said mayor and commonalty by the covenant hereinafter

4. For further assurance. contained: AND ALSO that they the said mayor and commonalty, and all persons rightfully claiming through, under, or in trust for them or their successors as aforesaid (except as hereinbefore excepted), shall at all times hereafter, &c. [*ut sup.* 21. 4.] for further assuring the fee-simple in the hereditaments hereinbefore described, with their appurtenances, either in remainder, reversion, or possession, as circumstances shall require, to the uses aforesaid, or otherwise, as the said B. Ball, his appointees, heirs and assigns, shall direct, and according to the intent of these presents, as by, &c. [*ut sup.* 21. 4.]

V. Agreement of purchaser to covenant. AND WHEREAS, by reason that the said mayor and commonalty will continue bound by their express covenants (7) in the aforesaid indenture of lease, it was agreed, on the

treaty for the sale aforesaid, that the said B. Ball should enter into the covenant

VI. Second Testatum.

hereinafter contained: THEREFORE THIS INDENTURE LASTLY WITNESSETH, that in pursuance of the same agreement, and for the considerations aforesaid, the said B. Ball,

Covenant by purchaser to indemnify.

for himself and his heirs, doth hereby covenant with the said mayor and commonalty, their successors and assigns, that he, his heirs, executors, and administrators, some or one of them, shall, at all times hereafter, observe the covenants and agreements in the aforesaid indenture of lease entered into by the said mayor and commonalty, and from the same covenants and agreements, and all liability in respect thereof, shall also indemnify the said mayor and commonalty, their successors and assigns, and every of them for ever by these presents: IN WITNESS whereof, the said mayor and commonalty their common seal have hereunto affixed,

* Dower trustee.

and the said B. Ball and D. Dicks * their hands and seals have hereunto set the day and year, &c.

(1) The proceedings of a corporation are authenticated by their common seal, the apposition of which to their deed perfects it without furtheir ceremony (*a*), unless an intent appear that such mere affixing it is not to pass the estate. (*b*)

(2) The words "on or about" are proper here, to avoid the possibility of nullifying the conveyance of the reversion which is grant-

(*a*) 4 Cruise, Dig. 28, 29. 3 Ed. (*b*) Derby canal v. Wilmot, 9 East, 360.

ed as such by a misdescription. In consequence of an error in the description of a remainder or reversion vitiating the grant of it, by losing the identity of the subject matter (*c*), it is prudent, in ordinary cases, and, of course, whenever the legal existence of the particular estate is doubted, to grant the lands generally, such a grant being (as we have before seen (*d*)) sufficient to pass the remainder or reversion.

(3) All lay civil corporations may alien their lands as freely as individuals. (*e*)

(4) The mayor cannot, by his deed, bind the corporation without his commonalty. (*f*)

(5) As reversions differ very materially from remainders in their incidental rights (*g*), it is proper to distinguish them carefully; and the student will never confound them if he remembers, that a remainder is a *new* estate created in a *stranger* at the same time with the particular estate (*h*); and that a reversion is the residue of the old or original estate continuing in him that made the particular estate. (*i*) A reversion, however, will pass by the name of a remainder, and *vice versâ*. (*k*)

(6) A corporation aggregate being, in legal supposition, an immortal body, it is, though usual, as nugatory for such a corporation to covenant for themselves and their successors, as it is in a conveyance to them to make a *limitation* to their successors. (*l*)

(7) Although the assignee of a reversion, like the assignee of a lease, is liable to, and has the benefit of, all covenants which run with the land (*m*), yet that circumstance will not discharge the assignor from an action on those covenants into which he himself entered. (*n*) The indemnity which is here given by the purchaser is demandable by the vendor in the absence of an agreement to give it; the purchaser of a reversion evidently being, when the vendor is subject to covenants in respect of it, in the same situation with the purchaser of a leasehold estate, who must covenant to indemnify his vendor against the rent and covenants in the lease, although not expressly required to do so in the conditions of

(*c*) Vid. Sup. 32. 15.
(*d*) Ibid.
(*e*) 1 Sid. 162. 10 Rep. 30. b.; aliter of ecclesiastical and eleemosynary corporations. See 1 Eliz. c. 19. 13 Eliz. c. 10.
(*f*) 1 Inst. 94. b.
(*g*) See 2 Bl. Com. 176.
(*h*) 1 Inst. 143. a.
(*i*) Ibid. 23. a. 142.
(*k*) Shep. Touch. 84.
(*l*) Vid. Sup. 151. n. 6, 7.
(*m*) 32 Hen. 8. c. 34. s. 2.
(*n*) Cro. Ja. 309.

sale (*o*); — and with the purchaser of an equity of redemption, who is compelled by equity, independently of contract, to indemnify his vendor against the personal obligation to pay the mortgage money. (*p*)

PRECEDENT XXVIII.

OF THE EQUITY OF A REDEMPTION (1) OF LANDS WHICH HAVE BEEN MORTGAGED IN FEE BY THE VENDOR; WHOM THE PURCHASER COVENANTS TO INDEMNIFY.

I. Parties. THIS INDENTURE, made, &c.

Between A. Ash, of, &c. of the one part, and B. Brown, of, &c. of the other part: WHEREAS the said A. Ash was, at the time of the date and execution of the indentures of lease and release hereinafter recited, seised in absolute fee-simple by purchase for a valuable consideration, of the hereditaments hereinafter described.

1. Vendor's seisin.

II. Recitals. 2. Mortgage. [*Mortgage in fee by lease and release from A. Ash to C. Corn*, 53. 3.]

3. Money due. [*Money still due*, 55. 8.]

4. Contract. AND WHEREAS, the said A. Ash hath contracted with the said B. Brown for the sale of

(*o*) 1 Bro. C. C. 52. Sup. 146. n. 6. (*p*) 7 Ves. Jun. 337. 8 Taunt. 365.

the equity of redemption of the said hereditaments, as hereinafter mentioned, for the
III. Testatum. sum of £ : NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £ of sterling money paid by the said B. Brown to the said A. Ash, immediately before the execution of these presents, in full for the purchase of the said hereditaments, subject to the aforesaid mortgage, but free from all other incumbrances, the receipt of which said sum the said A. Ash doth hereby acknowledge, and therefrom release the said B. Brown, he the said A. Ash by these presents *doth grant*
IV. Grant. to the said B. Brown and heirs, all [*Par-*
V. Habendum. *cels. Appurtenances*, 19. *Deeds*, ibid.] TO HAVE AND TO HOLD the hereditaments hereinbefore described with their appurtenances, unto the said B. Brown and his heirs, subject, nevertheless, to the aforesaid mortgage to the said C. Corn, and the payment of the sum of £ and the interest henceforth
VI. Covenants. to accrue for the same. [*Covenants* for*—1*st. Right to convey the said premises*, (subject as aforesaid.) 2*nd. For quiet enjoyment against* the said A. Ash, his heirs and assigns, or any other person or persons claiming or to claim, by or under him or them, (except the said C. Corn, his heirs and assigns, in respect of his said mortgage, and the interest thereof as aforesaid.) 3*rd. Freedom from incumbrances*,

* Ut sup. 20, 21, 22, with the present variations.

(except as hereinbefore mentioned. 4*th*. *For further assurance—extending to* the said A. Ash, his heirs and assigns, and every other person lawfully or equitably claiming, &c. by or under him, (except the said C. Corn, his heirs and assigns in respect of his said mortgage, and the interest thereof as aforesaid): AND to make and do, &c. all such further acts, &c. to the said B. Brown, his heirs and assigns, (subject to the said mortgage, and the interest thereof as aforesaid), be the same [&c. 21. 4.]

By the purchaser to indemnify the vender.

And lastly (2), the said B. Brown, for himself and his heirs doth hereby covenant with the said A. Ash, his heirs, executors, and administrators, that he the said B. Brown, his heirs, executors, administrators or assigns shall pay or cause to be paid unto the said C. Corn, his executors, administrators, or assigns, the said principal sum of £ now due to him as aforesaid, and all interest which may henceforth accrue in respect thereof, according to the intent of the said indenture of mortgage, and from the payment of the same principal sum and interest respectively shall at all times hereafter indemnify the said A. Ash, his heirs, executors, administrators, and assigns, "and every of them, and his and their goods, chattels, and hereditaments, and every part thereof respectively." (3)

In witness, &c.

(1) An equity of redemption is in substance identical with any other equitable estate, which is incapable not only of a conveyance at common law, but, strictly speaking, of a conveyance deriving its operation from the statute of uses, — that is to say, none of those conveyances can act in their peculiar manner on an equitable interest, because they all require a legal seisin; yet they, of course, all serve to transfer it. When, therefore, a formal conveyance of an equitable interest is made, a grant, as the most simple and generic of legal assurances, seems most appropriate. When we reflect, that a lease and release was originally intended only to be a substitute for a feoffment, and to avoid the necessity of delivering actual possession of the freehold, the common practice of conveying an equity of redemption of an estate mortgaged in fee, which assumes the legal freehold to be actually vested in another, seems rather absurd. When, however, the estate is only mortgaged for years, a lease and release is proper, because a mortgagee rarely enters; and entry, the student will remember, is requisite to perfect a lease at common law (*a*), and create a legal reversion in the mortgagor.

(2) This covenant (as we have before (*b*) remarked) the purchaser of an equity of redemption is compellable to enter into.

(3) These are usual, but surely very superfluous words. To indemnify the person is to indemnify his property.

(*a*) Co. Litt. 46.

(*b*) Page 237. (7).

CHAPTER V.

FEOFFMENT.

It would only be doing what has been amply done by others, and what has now ceased to be of primary importance in practice, to enter at large into the doctrine of feoffments, which, originally the most common of all conveyances of freehold estates, have now become the most infrequent, and are used but to attain particular objects. It is to the cases in which it is still in use, with an omission of the learning which, though still necessary to be known, is to be found in standard treatises (*a*), that I shall therefore proceed; premising, however, a few general observations on the nature and peculiar operation of a feoffment. We may define a feoffment to be the conveyance of a freehold in *corporeal* hereditaments, transferring the whole estate of the grantor (*b*), by delivery of the possession upon or within view of the hereditaments conveyed. (*c*) The leading feature of this convey-

(*a*) See Sheph. Touch. c. 9.

(*b*) It is said that when the *fee* is not given the instrument is sometimes, though *improperly*, called a feoffment. Ibid. p. 203. Co. Litt. 9. a. Mr. Preston observes, on the passage in Shephard, that when an estate of freehold only is granted, the asurance is denominated a *lease*. Ibid. 7th Ed. But *that*, of course, is *not* the case when a tenant for life conveys his whole estate; though it may be said, perhaps, that the instrument is then more properly an *assignment*. vid. p. 170. (2.)

(*c*) A feoffment has been frequently defined, and with various degrees of accuracy. Blackstone's definition, (2 Com. 310.) "The gift of any corporeal here-

ance, as contradistinguished from a grant, from a release by enlargement (*d*) which is in the nature of a grant, and from bargains and sales (*e*), and covenants to stand seised (*f*), is its tortious operation when made by the tenant of a particular estate. Hence, if made by tenant for life, it bars the contingent remainders dependent on (*g*), and the powers appendant and in gross annexed to (*h*), his estate. By a natural application of the same principle, when made by a tenant for years it likewise passes the fee-simple, which involves the acquisition of a freehold: it consequently destroys the term: for the termor is in possession, and possession is all that the law requires to give validity to a feoffment (*i*), as the essence of that conveyance is the livery of seisin, or actual delivery of possession. But in modern times the courts appear determined to relax the strictness of the ancient law with respect to disseisin, and to consider a feoffment by tenant for years, as working not an actual disseisin, but a disseisin at the election of the lessor; a doctrine first broached, and ably and energetically maintained by Lord Mansfield (*k*), rather however on the principles of common sense than of technical jurisprudence. One main reason for depriving feoffments of their ancient efficacy in reference to the doctrine of disseisin, is that they do not retain their primitive publicity, and are not, therefore, within the scope of the ancient policy. Mr. Butler has, however, impugned this objection by showing (what must be readily conceded) that the same legal solemni-

ditament to another;" which he affirms to be the *proper* one, is, in truth, *no* definition. The genus is given, the specific difference *totally omitted*; as the least reflection evinces. Mr. Sanders's definition, (2 Uses, p. 1.) is far more accurate, but still imperfect, from equally applying to gifts in tail, and leases for life. It is conceived that Shephard's is the most correct. Touch. 203.

(*d*) Vid. Fearne, 322, sup. 8. (*e*) Gilb. Uses, 140.

(*f*) The same principle equally applies to this assurance.

(*g*) 1 Rep. 66. (*h*) Hard. 410—416, vid. sup. 8.

(*i*) 1 Burr. 92. Bract. Lib. 2. f. 31. a. 11. b. Bro. Dis. 64.

(*k*) In Taylor v. Horde, 1 Burr. 60. 5 Bro. P. Ca. 247. Cowp. 689.

ties which they possessed originally they retain now. (*l*) But it is a matter of fact with which legal reasoning has nothing to do, and which is evident to every one, that it is quite impossible, in a populous and commercial country like modern England, for a feoffment to be in reality more overt and impressive than any other conveyance. It cannot, however, be considered yet as settled, that though a feoffment by tenant for years destroys the term, and operates a forfeiture, it only creates a disseisin at the election of the lessor. But another case frequently occurs in practice, which involves the nature of a feoffment, and the learning of disseisins; and that is, when a feoffment is made by the cestuique trust of a term; which has been often done for the purpose of converting a long term into a fee through the superinduced operation of a fine levied on the tortiously acquired freehold. Up to a recent period it was considered that such a feoffment was effectual on the ground of its working a disseisin, and gaining a freehold; and the practice for the beneficial owner to assign the term in trust, and then enfeoff, proceeded on this assumption. (*m*) But a late case has decided that a feoffment by the cestuique trust of a term has not the effect of destroying it, when not made with the consent of the legal termor. (*n*)

It appears, however, to the writer, that some considerations which might have been urged in the arguments on this case, were not adverted to. With respect to the statute of 1 Richard 3. c. 1. it is presumed, that as it was not mentioned, the cases *might* have been deemed, both by the bar and bench, to have set at rest the question whether that statute enabled the cestuique trust of a term to convey it alone. And though as long terms were frequently created

(*l*) But. Co. Lit. 330. b. n. 1.
(*m*) See 2 Sand. Uses, 23.
(*n*) Doe v. Lynes, 3 B. and Cres. 388.

before the reign of Richard 3. (*o*), though a trust declared on them was certainly within the mischief levelled at by that statute, and though the language in the body of it is sufficiently comprehensive to embrace every species of subject matter, yet as its *title* applies only to those fiduciary interests which were in strictness *uses*, and the authorities have, in general (*p*), considered it inapplicable to the trust of a term, we are now, perhaps, compelled to acquiesce in that construction. The conclusion is, therefore, that the feoffment of the cestuique trust of a term cannot of its own force destroy the term. But it is conceived that a question may be raised whether *primâ facie* the consent of the trustee ought not to be presumed, in the absence of evidence to the contrary. It is settled, that in cases of a mixed nature the courts of law may recognise trusts; and this should seem to be one of those; for the court of king's bench, in the case of Doe v. Lynes, did certainly regard the relation of trustee and cestuique trust. For one main ground of the decision is, that the *objects* of the assignment would be defeated by the feoffment (*q*),— that the *trusts* would probably continue a long time,—and that the trustees ought not to lend themselves to any act to defeat that interest. (*r*) But the courts of law, in so far noticing the fiduciary ownership, must, of course, recognise and admit that *privity* which is and must

(*o*) See 2 Bl. Com. 142.

(*p*) See 1 Sand. Uses, 34 to 40. It is, however, singular that Mr. Sanders should have cited the case of Goodtitle v. Jones, 7 T. Rep. 47. to prove the inapplicability of this statute. Both Lord Kenyon and Mr. Justice Grose said, "it only applied to cases in which the trust in its origin was created for the benefit of the owner of the estate." In that case, the term which was attendant on the inheritance, was created not for the benefit of the grantor, but of a mortgagee. It was, therefore, impossible for the court to have recognised the existence of this statute in a plainer way, or to have more distinctly pointed out the cases to which it applied. Vid. ibid. 50. Its existence was also admitted in Blake v. Foster, 8 T. Rep. 494. And see 1 H. Bl. 566.

(*q*) Per Abbot, C. J. 3 Bar. and Cres. 403.

(*r*) Per Bayley, J. 405. Ibid.

be, in the very nature of the thing, presumed to subsist between the trustee and his cestuique trust; and, consequently, in a case differently circumstanced from that of Doe v. Lynes (*s*), and to which the reason which has been mentioned cannot apply (*t*), it should seem to follow, that the trustee ought to be deemed acquainted with and acquiescent in the acts of the cestuique trust. If the legal liability of forfeiture, to which such consent may expose him, be urged, it may be answered by the same argument; for by looking at the trustee in his real character, the courts of law, to avoid a gross inconsistency, are forced to concede, that the loss does not fall on him, but on his cestuique trust. If this reasoning be just, the result is, that Doe v. Lynes is not an authority for those cases in which the feoffment is made by the cestuique trust of the term, when he is the sole and entire owner of it, but only to those in which he has a partial interest, and in which, therefore, the concurrence of the trustee in a feoffment by one of the equitable takers would be a breach of trust.

But one assumption in Doe v. Lynes ought, perhaps, to be noticed; it being (it is with great deference submitted) not strictly just. The feoffment was made by the first equitable limitee, who was in possession of the lands under and according to the trusts of the assignment. Now it is a clear point, that although, generally speaking, the real interest of a cestuique trust is not regarded at law, he is not on the footing of a stranger, but is tenant at will to the trustee. (*u*) Consequently the feoffor in the above case *was* entitled to the actual possession; which weakens the judgment therein,

(*s*) There the feoffor had only a *limited* equitable interest.

(*t*) As to one in which the feoffor has the sole and absolute ownership of the equitable interest of the term.

(*u*) 1 Show. Rep. 73. So, it seems, is a mortgagor to his mortgagee, Doug. 710. Doe v. Pott. Keech v. Hall, ibid. 21. but as to him, there are conflicting *dicta* (see Doug. 265. 5 Bar. and Ald. 604.), and all of them are crude and loose. But Mr. Coote's conclusions on this point (Mortgages, 327—9.) are demonstrably just.

so far as it is grounded on the assumption of the right to the actual possession being in the trustee. (*u*)

Upon the whole, however, the practical conclusion is, that in the present temper of the courts, a purchaser cannot be advised to rely on the freehold-gaining power of a feoffment, even when made by a legal tenant for years.

For the length of this dissertation, the author requires much, and for its freedom, more, indulgence; but he thought it better, for the reason above given, to examine, to the best of his ability, the latest modification which this peculiar branch of the learning has assumed, than to attempt an outline of the general doctrine.

(*u*) This assumption was made by Bayley, J. and Holroyd, J. 3 Bar. and C. 405, 406.; and as they admitted the capability of one who had an actual right to the possession to make a feoffment, it follows, that if the author's reasoning be just, they conceded the right of a cestuique trust to do it.

PRECEDENT XXIX.

OF THE LEGAL ESTATE (1) OF VARIOUS HEREDITAMENTS WHICH HAVE BEEN SOLD IN LOTS, TO A TRUSTEE FOR THE FEOFFORS, FOR THE PURPOSE OF CONSOLIDATING THE TITLE THEREOF, BY TWO TENANTS IN COMMON AND THEIR WIVES, WITH COVENANT TO LEVY A FINE, AND POWERS OF ATTORNEY TO DELIVER AND RECEIVE SEISIN.

THIS INDENTURE, &c.

I. Parties. between L. Long, of, &c. and M. his wife, of the first part, S. Sims, of, &c. and B. his wife, of the second part, L. Luke of, &c. of the third part, B. Butt, of, &c. of the fourth part, and J. Jones, of, &c. of the fifth part: WHEREAS the said L. Long is seised in fee-simple (subject to the dower of his said wife) of three fifths of the hereditaments hereinafter described, and the said S. Sims is seised in fee-simple (subject to the dower of his said wife) of the remaining two fifths thereof (2): AND WHEREAS the said hereditaments have been lately agreed to be sold in lots; and in order to bring the evidence of their title within smaller limits (3), and extinguish all right of dower in the said M. Long and B. Sims, it has been agreed that a feoffment shall be made and fine levied

II. Recitals.
1. Seisin of a tenant in common subject to dower.
Of the other.
2. Sale in lots.
Agreement for feoffment and fine.

of the said hereditaments as hereinafter
III. Testatum. mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, they the said L. Long and M. his wife, S. Sims and B. his wife, according to
IV. Operative part. their respective shares and interests, HAVE given and granted (4), and by these presents DO give (5) and grant unto the said L. Luke and his heirs, ALL [*Parcels.*] [*Appurtenances*, 19.]:
V. Habendum. TO HAVE AND TO HOLD the aforesaid hereditaments, with their appurtenances, to and to the use of the said L. Luke and his
VI. Trusts. heirs,* UPON TRUST as concerning the said three fifth parts thereof, for the said L. Long and his heirs; and as concerning the remaining two fifth parts thereof, in trust for the
VII. Covenant to levy fine. said S. Sims and his heirs: AND the said L. Long doth hereby, for himself and his heirs, and as far as relates to his said three fifths in the hereditaments hereinbefore described, and the acts and defaults of himself and his said wife relating thereto; AND the said S. Sims doth hereby, &c. [*similar language*] covenant with the said L. Luke, his heirs and assigns, that they the said L. Long and M. his wife, and S. Sim and B. his wife (the said M. Long and B. Sims hereby consenting), shall, at their own expence in

* Vid. sup. p. 206. n. (l.)

all things, in or as of Hilary term now last (6), or some subsequent term, levy to the said L. Luke or his heirs, in due form of law, a fine *sur conuzance de droit come ceo* with proclamations, of the hereditaments hereinbefore described, by the names and other descriptions proper for passing the same, as by the said L. Luke, his heirs or assigns, or his or their counsel in the law shall be advised and required: AND it is hereby declared, that the said fine or fines, when levied, shall enure to the use hereinbefore limited, and in confirmation of these presents: AND the said L. Long and M. his wife, S. Sims and B. his wife, by these presents do appoint the said B. Butt their attorney (7) for them, and in their name and stead, to take possession and seisin of the above described hereditaments, or some part thereof, in the name of the whole, and then to deliver possession and seisin of the same hereditaments, or of some part thereof, in the name of the whole, unto the said L. Luke, or to his attorney in that behalf lawfully authorised, according to the form and effect (8) and true intent of these presents: AND the said L. Luke by these presents doth appoint the said J. Jones his attorney for him and in his name and as his act to receive the aforesaid possession and seisin from the said B. Butt, nevertheless to the use of the

VIII. Declaration of use.

IX. Power of attorney to deliver seisin.

X. To receive.

said L. Luke in manner aforesaid, and according to the intent of these presents. In witness, &c.

(1) This conveyance is not a purchase deed; but being an expedient mode of effecting a purchase transaction, under the circumstances of the case, it is within the design of this work.

(2) These persons are tenants in common. A joint tenancy is not subject to dower, as the right of the survivor is paramount to that of the wife. (*a*)

(3) Notwithstanding Doe v. Lynes (*b*), it will, it is apprehended, continue to be considered, even by those who may not acquiesce in the inference which has been before drawn from that case, that there are cases in which a feoffment may be adopted with propriety, and relied on with certainty; as when it is made by the owner of the inheritance to ease the title of outstanding terms, which, with the assistance of a fine levied on the immediate freehold it acquires, it may do in five years. For the moral and political argument which may by urged against its operation, when made by the termor to the prejudice of the reversioner, is in favour of such an operation, when it is made by the reversioner himself, who has also the present equitable right of enjoyment. And here it is important to admit the cestuique trust's right to the actual possession, as *tenant at will;* for by forgetting that *legal* relation, and assuming that right to be in the trustee, we might, from recent *dicta* (*c*), as they appear in the reports, be led to conclude the feoffment of such cestuique trust to be invalid, on account of his being, in the eye of the law, on the same footing with a stranger.

(4) It has already been hinted, that repetition of the operative words in a feoffment, or any instrument in the nature of it,—that is, any conveyance at common law of a freehold in corporeal hereditaments in possession,—is proper (*d*); because the past tense refers to an act which may be supposed antecedent to, and must be distinct from, the written instrument, which is not itself the legal medium of transfer, but only evidence of it; the livery of seisin being the real conveyance. (*e*)

(*a*) Litt. s. 45. Co. Litt. 37.
(*b*) Sup. 243.
(*c*) Vid. sup. p. 246. n. (u)
(*d*) P. 13. (4.)
(*e*) Co. Litt. 281. See the mode of pleading a feoffment, 2 Roll. Abr. 682. deduced from this principle.

(5) This is the only word which makes an implied warranty in the conveyance of a freehold (*f*) — and to this warranty the feoffor only, since the statute of *quia emptores*, is bound (*g*); but during the feoffor's life it is *general* (*h*), — that is, it extends to an eviction by any person.

(6) It is observable, that this deed is correctly called a deed, *leading* the uses of the fine; because, although the fine is levied as of a preceding term, it is, in fact, levied after the execution of the deed. (*i*)

(7) Livery in *deed* is performed by the feoffor's *coming upon the land*, and delivering to the feoffee either a clod, branch, or turf, there growing (*k*); or the charter itself (*l*); — in the name of seisin of all the lands comprised in the deed; or by telling the feoffee to enter into the land, and take seisin of it in the name of all the lands contained in the deed (*m*); — and it may, as contradistinguished to livery *in law* (*n*), — which is, when the feoffor is not actually *upon* the land, but only in sight of it (*o*), — be *given* or *received* by attorney. But the power must, in either case, be by *deed*; and when, as in the present instance, the feoffment is by deed *indented*, Lord Coke's authority (*p*) (but which appears to be doubtful (*q*)) is express, that the attorney must be a party.

(8) An opinion formerly prevailed (and it is believed, very generally), that when the power was in this form,—viz. to deliver seisin according to the form and effect of the deed, the attorney, in consequence of his having only a bare authority, was confined to make livery on the day of the date of the deed (*r*): but it is now settled, that he may do it at a convenient opportunity afterwards. (*s*)

(*f*) Co. Litt. 383, 384. Co. 4. 81. Touch. 184.

(*g*) See 2 Bl. Comm. 300. the reason of this restriction. It is otherwise in a gift in tail and lease for life; for then the heirs of the grantor are likewise bound to the warranty.

(*h*) Touch. 185.

(*i*) See 1 Prest. Conv. 318.

(*k*) 2 Bl. Com. 315.

(*l*) 9 Co. 138. a. 2 Roll. Abr. 7. pl. 10.

(*m*) 9 Rep. 136. Cro. Jac. 80. But the mere delivery of a deed of feoffment on the land, will not amount to livery of seisin; for it has another operation, to take effect as a deed. Ibid.

(*n*) Co. Litt. 52. b. Touch. 217.

(*o*) Pollexf. 47. 2 Bac. Abr. 485.

(*p*) 1 Inst. 52 b.

(*q*) 2 Ro. Abr. 8. pl. 12. Cro. Eliz. 905. Co. Litt. *in notis*. (4) But it appears by the margin, that Lord Coke was well aware of these authorities, and rejected them with contempt. "*Communis error* facit *jus (ut dicitur) in contrarium.*"

(*r*) Hennings v. Pauchard, Cro. Jac. 153.

(*s*) Roe dem. Heale v. Rashleigh, 3 Bar. & Ald. 156.

PRECEDENT XXX.

OF A PEW IN THE AISLE OF A CHURCH (1) BY A DEVISEE IN TRUST FOR SALE UNDER THE WILL OF A PERSON TO WHOM THE PREMISES HAD NOT BEEN PROPERLY CONVEYED; WITH THE CONCURRENCE OF THE HEIR OF THE TESTATOR, AND OF THE PERSON HAVING THE LEGAL ESTATE.

I. Parties. THIS INDENTURE made, &c.

Between B. Brown, of, &c. of the first part, C. Cook, of, &c. of the second part, F. Fell, of, &c. of the third part, G. George, of, &c. of the fourth part, and D. Dyke, of, &c. of the fifth part: WHEREAS, by an indenture bearing date on the day of , and made between the said B. Brown, of the one part, and F. Fell (since deceased), of the other part, for the valuable considerations therein mentioned, the pew hereinafter described was expressed to be conveyed to and to the use of the said F. Fell and his heirs; but such indenture being accompanied neither by enrolment nor livery of seisin was void at law (2): AND WHEREAS, the said C. Cook is devisee of the property of the said F. Fell, deceased, (including the said pew), in trust for sale; and as such trustee has contracted with the said G. George for the sale of the

II. Recitals.

1. Last purchase deed.

Void at law.

2. Contract for sale by the purchaser's devisees in trust for sale.

said pew, as hereinafter mentioned, for the price of £ ; and the said B. Brown, in whom the legal estate of the said pew is still vested, and the said F. Fell, as the heir of the said F. Fell, deceased (3), have respectively agreed at the request of the said C. Cook, to concur in these presents: NOW THIS INDENTURE WITNESSETH, that in consideration of £ of, &c. to the said C. Cook, paid by the said G. George immediately before the execution, &c. [*Sup.* 18. II.] They the said B. Brown, F. Fell, and C. Cook, according to their respective interests therein, HAVE given and granted, and by these presents DO give, grant, and confirm, unto the said G. George and his heirs, ALL that seat or pew, &c. [*Description.*] With full liberty of ingress, egress, and regress to and from the same at all reasonable times. (4) [*Appurtenances*, 19.] [*Habendum in fee* (5), 80. VI.]

Agreement of the original vendor and the heir of last purchaser to join.

III. Testatum.

IV. Operative part.

Habendum.

[*Covenant by the grantors, that they have not incumbered*, 60. IX.] And the said parties of the first, second, and third parts, do by these presents appoint the said D. Dyke their attorney for them, and in their names to enter into the said pew, to obtain and deliver seisin thereof to the said G. George, or his attorney lawfully constituted, to hold the same seat to the said G. George and his heirs, according to the form, effect, and intent of these presents. In witness, &c.

Trustee's covenant.

Power of attorney.

(1) The conveyance of a pew is not a common occurrence, for by the ecclesiastical law (in this instance adopted by and blended with our common law), it cannot be granted even by the ordinary to a person and his heirs absolutely (*a*), because it does not belong to the *person*, but to the *inhabitant*, and cannot be claimed by prescription as appendant to *land*, but to a *house*. (*b*) A pew in the *aisle* of a church may, however, be prescribed for as appurtenant to a house out of the parish; though it is the better opinion that a pew in the *body* of a church cannot. (*c*) For an aisle which has immemorially belonged to a particular house, and been maintained by the owner of it, is part of his frank-tenement (*d*), and being, therefore, supposed to be held in respect of the house, will go with it to him that inhabits it. (*e*) But a grant of the *chancel* to a person in fee by a lay impropriator (*à fortiori* by a spiritual rector) is void (*f*); because it would enable him to desecrate that part of the church where particular parts of the service are required to be performed, and to take it out of the jurisdiction of the ordinary. (*g*) But the present precedent was prepared in a case in which the pews were freeholds under the construction of a statute for building the church and granting pews.

(2) This conclusion is evidently just of any single instrument in reference to a present estate of freeholds in lands; for the only conveyances which *directly* pass such an estate are bargains and sales and feoffments; the former of which are void without enrolment, and the latter without livery. A lease and release indeed *may* be contained in the same instrument (*h*); but they are still two distinct acts, and such an union of them is in the highest degree informal and anomalous.

But the recited indenture, though void as a conveyance, is good in equity as a contract.

(3) As there is no dower out of an equitable interest, which was all that could pass to F. Fell, the deceased husband, it would have

(*a*) Gibs. 197. (*b*) Ibid. 198.

(*c*) Davis v. Witts, Forrest, 14. where this point seems doubtful. But see Pettman v. Bridger, Phill. 323. Fuller v. Lane, 2 Addams, 425, and the late case of Byerley v. Windus, 5 Bar. & Cres. 1.

(*d*) Gibs. 197.

(*e*) 12 Co. 106. 2 Keb. 92. 2 Buls. 150. 1 Sid. 88.

(*f*) Clifford v. Wicks, 1 Bar. & Ald. 498.

(*g*) Per Lord Ellenborough, ibid. 506.

(*h*) 1 Freem. 251; for priority shall be supposed.

been quite unnecessary to have made the last purchaser's widow (if he left one), a party to release it.

(4) These words, though usual in this and similar cases, are, on on first principles, superfluous. For when the law gives any thing to one, it gives impliedly whatever is necessary to its enjoyment. (*i*)

(5) The conveyance *might* be made to dower uses.

(*i*) Co. Litt. 56.

APPENDIX.

To obviate an objection which may be taken to the present work by those who are averse to the omission of any of the usual clauses, the following are subjoined. They appear to the author the most indefensible member of modern conveyancing; and juridical reformists have, accordingly, aimed their shafts at them with considerable effect. "Suppose" (says a lively and ingenious writer (*a*), addressing himself to conveyancing, which he is pleased to call the *mystery of mysteries — the apocalypse of the law*), "suppose a man to purchase an acre of bare land on the top of a mountain, to which water, except from the clouds, could never come, and where there was neither house, bush, nor body. In the deed of conveyance the land must be described. And how would the clerk or scrivener acquit himself? Why, first of all, the land would be described by its boundaries, and then would follow, together with," &c. (*vid. infra*) "*the rhapsody and effervescence of a dull and uningenious imagination.*" This censure is admitted to be just. But the conclusion which its author draws, of the necessity of a radical reform in our laws of property, by no means follows, unless it can be shewn that *they* require this ludicrous (*b*) verbiage; and Mr. *Humphreys* (*c*) has himself admitted its inutility. The law itself declares, in the plainest and most express terms, that *every thing appendant or appurtenant*, as common,

(*a*) Edinburgh Review, Vol. XLV. p. 472.

(*b*) It is, as the same writer has remarked, *mischievous* likewise in a great degree, when we remember that this mass of words is constantly incorporated with legal, and more especially with equitable, proceedings.

(*c*) Vid. sup. 15. n. (*m*.)

turbary, estovers, &c. passes by a grant of the land *cum pertinentiis*. 3 Lev. 165. See a full development of the comprehensive word *appurtenances*, Comyn's Dig. Grant, (E 9.) There is, however, some sense in the *sweeping* clause (*d*), where the least doubt is entertained of the correctness of the specific description.

GENERAL WORDS.

For a Manor.

AND all and singular the messuages, farms, cottages, houses, outhouses, edifices, buildings, stables, barns, coach-houses, dove-cotes, yards, gardens, orchards, backsides, tofts, crofts, lands, meadows, pastures, heaths, moors, marshes, bogs and waste grounds, folds, fold-courses and liberty of foldage, feedings, parks, warrens, free chase and free warren, common, common of pasture, common of turbary, mines, minerals, quarries, mills, fairs, markets, customs, tolls, duties, furzes, trees, woods, underwoods, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, water-courses, lands covered with water, fisheries, fowlings, courts leet, courts baron and other courts, perquisites and profits of courts, view of frankpledge and all that to view of frankpledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons, and of fugitives, and of felons of themselves and put in exigent, and of outlawed persons, dividends, waifs, estrays, treasure-trove, chief rents, quit rents, rent-charges, rent-seck, rents of assize, fee-farm rents, boons, services, royalties, jurisdictions, franchises, and all other rights, jurisdictions, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever,

(*d*) Sup. p. 199. V.

to the said manor, reputed manor, &c. hereby released or otherwise assured, or intended so to be, respectively belonging, or in anywise appertaining, or with the same or any of them respectively, now demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known, as part, parcel, or member, of them, or of any part of them, or appurtenant thereunto, with their and every of their rights, royalties, franchises, members, and appurtenances.

For a House.

Together with all and singular outhouses, edifices, buildings, cellars, areas, courts, court-yards, warehouses, pumps, cisterns, privies, sewers, gutters, drains, backsides, paths, passages, lights, easements, profits, privileges, commodities, emoluments, and appurtenances whatsoever, to the said hereditaments and premises hereby released, &c. belonging, or in anywise appertaining, or accepted, reputed, taken, known, held, occupied, or enjoyed, as part, parcel, or member thereof, or of any part thereof.

For Lands.

Together with all edifices, buildings, trees of every kind, woods, underwoods, and the ground and soil thereof, commons, common of pasture and turbary, and other commonable rights, hedges, ditches, fences, ways, mounds, passages, waters, water-courses, easements, liberties, privileges, emoluments, and appurtenances whatsoever, to the said pieces or parcels of land hereby released, &c., or any of them, respectively belonging, or in any wise appertaining.

For Farms.

And all houses, cottages, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture, trees of every kind, woods, underwoods, feedings, and the

ground and soil thereof, commons, common of pasture, and of turbary, and other commonable rights, hedges, ditches, fences, ways, paths, passages, waters, water-courses, lands covered with water, sewers, drains, liberties, privileges, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said hereditaments and premises hereby appointed and released, or intended so to be, or any of them, respectively belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed as part, parcel, or member of the same, or any of them.

For Marsh Lands.

Together with all walls, banks, dykes, ditches, sluices, sluice-gates, fowlings, fishings, waters, water-courses, ways, drifts, ways, paths, passages, easements, privileges, emoluments, rights, members, and appurtenances whatsoever, to the said hereditaments and premises belonging.

For Woodlands.

Together with all timber, timber trees, and woods growing and being upon the said premises, and all commons and right of commonage, and all other rights, ways, easements, liberties, privileges, emoluments, and appurtenances whatsoever, to the said hereditaments and premises belonging, &c.

For a Watermill.

And also the full use of the mill-dams, and streams of water appertaining to the said mill for making the same, and also the full use of the water-wheels and water-engines, cisterns, and other machinery belonging to the said mill, or necessary for the working, ease, or enjoyment thereof; and generally all and singular the rights, members, and appurtenances to the

said hereby demised premises, or any part thereof belonging, or appertaining.

*For Advowsons.**

And all messuages, cottages, edifices, glebe and other lands, meadows, pastures, feedings, tithes, oblations, obventions, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said *advowson, donation, and right of presentation and patronage,* hereby granted and confirmed, or otherwise assured, or intended so to be, belonging or in any wise appertaining or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel, or member of the same, or any of them respectively.

CLAUSE OF REVERSIONS AND ESTATES.

And the reversion and reversions, remainder and remainders, rents, issues, and profits, of and incident to the hereditaments and premises hereby released or otherwise assured, or intended so to be, and every part and parcel thereof with their appurtenances: And all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, or otherwise howsoever of him the said B., of, into, and out of, the same hereditaments and premises, and every part and parcel thereof, with their appurtenances.

* The same words are used for a rectory; when they are, substitute *rectory* for the expressions in italics.

*** *Should the present work meet the approbation of the Profession, and the Author's avocations allow of it, it is his intention to treat of other subjects* (*as Mortgages, Settlements, &c.*) *in the same manner. Should he realize this scheme, each topic will be dependent on and connected with the prior publications, but be perfectly independent of any subsequent ones.*

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* When passages in the notes on the precedents are referred to, the note is added to the page.

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